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In The Supreme Court of the United States

October Term, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS,

Petitioners,

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council for City of Harper Woods, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

SHOULD THE "SHOCK THE CONSCIENCE" TEST FOR INVOKING FEDERAL COURT JURISDICTION FOR SUBSTANTIVE DUE PROCESS VIOLATIONS IN LAND USE CASES BE FOLLOWED AND SHOULD THE SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS BE RESOLVED IN FAVOR OF ONE TEST?

LIST OF PARENT COMPANIES AND NONWHOLLY-OWNED SUBSIDIARIES

Woodpointe Associates Limited Partnership has no parent companies or nonwholly-owned subsidiaries.

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Petitioners, WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, THOMAS A. HANDLOS and LUCILLE HANDLOS, respectfully pray that a writ of certiorari issue to review the Order of the Sixth Circuit entered in this proceeding on March 7, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 48 F.3d 1220, 1995 WL 94760 (6th Cir. 1995).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on March 7, 1995. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1, provides:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * * "

42 USCA § 1983 provides that:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

This action involved use of a parcel of land, located in the City of Harper Woods (the "City"), which was sold by the City as "C-1," commercial property after the construction of Interstate I-94.

In 1979, Plaintiffs became interested in the property as a potential hotel site and inquired with the City, receiving a positive and encouraging response.

According to the City Ordinance, in order to build a hotel project, Plaintiffs were required to receive special approval of the City Council in order to build a hotel within the City. Such use was to be permitted by the

City Council after a public hearing and review of the proposed site plan by the City Planning Commission. Section 10-164 uses the term "shall" rather than "may," designating that the special use permit was non-discretionary rather than discretionary when the site plan met the requirements.

As the hotel site became known to the public, a certain nearby resident, Defendant McNally, expressed his opposition to having a hotel close to his home. He thereafter used a strong opposition campaign to the hotel project to gain political popularity and become a City Council member. (See Campaign Material and Letter to Neighbors in separately-bound Appendix at A-15–A-20.) His expressed goal was to be elected district judge for the City. His initial opposition consisted initially of going door to door delivering brochures, speaking up at public meetings and encouraging the public to join him in the opposition. His conduct included misstatements about the Hotel Project including that it would: Attract undesirable people and place them near the residential homes; attract threatening criminals, burglars and prostitutes; Confuse "out-of-town" drivers who would not understand the traffic patterns and would ignore traffic signs; depress their property values and cause homes to be torn down; and possibly be run and operated by dishonest or inconsiderate people whose future uses may not be acceptable to the neighbors.[1]

After election to the City Council, Defendant McNally continued to recruit other counsel members, as well as the public, to oppose the project, stating his reiterated, unfounded objections. Because of Defendant McNally's

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1 The City of Harper Woods is virtually a 98% Caucasian community annex to the northeast portion of the City of Detroit, a community consisting of mostly African Americans. The statements by Defendant McNally relating to Plaintiffs' hiring of minorities and the hotel project attracting "*undesirable people*," "out-of-town" drivers, criminals, prostitutes, burglars, etc. implied those residents from the City of Detroit. Plaintiffs alleged that Defendants were motivated to prevent the construction of the hotel project in order to deter minorities from Detroit from working and loitering on property nearby to their residential homes. These allegations were based on Defendants' statements and actions toward the hotel project.

ill-motives, Plaintiffs were forced to endure years of obstructions and obstacles.

In May of 1991, the City approved a special use permit for the proposed hotel project and determined that it complied with the City Ordinances. The City Council conditioned the permit with several difficult provisions which were intended to and would discourage and hinder the hotel project from going forward. For example, for the first time ever in the history of the City on private developers, it required Plaintiffs to submit a bond equal to 5% of the value of the entire project including buildings prior to any construction permits.

Due to the extenuating, unexpected circumstances that year suffered by the developer, he was unable to initiate the construction as anticipated. He suffered a disease which amounted to sudden deafness and extreme vertigo (dizziness) which required extensive surgeries and bed-rest which made correspondence with other individuals associated with the hotel project difficult. On two occasions during the one-year period to commence construction, he requested an extension of time. Defendants refused to grant an extension. When the developer attempted to go forward to meet the one-year construction requirements, tendered a 5% bond and building permit application for the first phase, the City refused to accept the bond and grant a building permit. When the developer attempted to cut the curb in order to allow some types of construction which did not require a building permit, the City halted his work, claiming that he should have used more expensive machinery on "such an expensive project" despite that his method was also a customary method used previously within the City.

When the special use permit finally expired, Plaintiffs reapplied with virtually the same plan. *There was no substantial change of circumstances which was asserted to have affected the decision on a special use permit for*

the hotel project. The City Planning Commission, City Planner and City Manager again approved the site plan and recommended approval of the special use permit as being in compliance with all City Ordinances.[2]

The City Council public hearing was held on October 5, 1992. Despite the site plan's compliance with the City Ordinances and the previous recommendations, the City Council denied the special use permit.

Defendant McNally made a public statement against the hotel project that although section 10-164 of the City Ordinance stated that the City Council *shall* permit certain uses, the term "shall" did not always mean "shall" but really meant "may," giving discretionary power to the City Council. Defendant McNally went on to point out what he believed were the faults in the site plan. He concluded his lengthy speech with the following statement about the project:

> "A few years ago I developed an allergy to dogs. And it was pretty sad because I always really like dogs a lot. My wife knew how much I liked dogs, so she went out and bought me a little terrier. She knew too that I had an allergy to dogs, so she told me it was a cat. She said it was a cat so it shouldn't bother you. Well, I still sneezed, and my eyes still watered, and we had to give the cat away. Despite the fact that she called it a cat, it was still a dog and I was still allergic to it. *Well, Mr. Handlos has presented us a smaller project. He says it requires less parking and will generate less traffic. He says the sewer can handle it. But I say it's still a dog, and I'm still allergic to it. And I'm*

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2 See excerpts of deposition transcripts for Planning Commission members John Soullier, Neil Patterson, Alexander Varchetti, and City Planner Brandon Rogers, which demonstrate the hotel project's compliance with the City Ordinances, reproduced in the Appendix hereto at A-23, A-24, A-25 and A-21, respectively.

going to vote no." City Council Meeting Minutes, October 5, 1992, p. 17.

Consistent with the determinations and recommendations of its Planning Commission, the City Manager and the City Attorney that there was full compliance with the City Ordinances, as appears in the record of the City Council meeting minutes of October 5, 1992, there was no basis of turning down the request for reapproval of the special use permit. The request was for reapproval of what had been approved by the City Council on May 5, 1991, without any substantial changes. The City Council's denial was a final step of Defendants in a long line of actions which made it impossible to develop the property.

Following the denial of a special use permit on October 5, 1992, Defendants were served with the Complaint, alleging among other things, a substantive due process violation for denying the special use permit.[3]

Defendants' position against Plaintiffs' substantive due process claim was two-fold: One, that Plaintiffs have never followed through with any of the several proposed projects, and; Two, that Plaintiffs did not have the "wherewithal" to develop the property as a hotel project. First, there is no dispute that the different projects were proposed; only one was ever approved by Defendants. The only reason the project was not timely commenced under that permit was because the developer became severely ill for the duration of most of that

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[3] **The Verified Complaint contained six counts: Count I – A Taking Without Just Compensation or Deprivation of Property; Count II – Deprivation of Equal Protection of Law; Count III – Deprivation of Substantive Due Process of Law, Vagueness, Unfairness and Unreasonableness; Count IV – Deprivation of Procedural Due Process of Law; Count V – Unconstitutional Municipal Ordinance or Unconstitutional Application of A Municipal Ordinance; and Count VI – Conspiracy to Interfere With Civil Rights. For a more detailed statement of facts and allegations, see the Verified Complaint as reproduced at pages 67-204 of Plaintiffs' Appendix filed with the Sixth Circuit Court of Appeals.**

year. Previously and thereafter, Defendants created nothing other than "roadblocks" concerning the development of the property. Second, Defendants claimed their actions were due to questions about Plaintiffs' ability to follow through with the hotel project; however, they did not even inquired into Plaintiffs' business or financial background until *after* the instigation of this lawsuit. Even after the suit was filed, Defendants discovered that Plaintiffs' success rate was 100 percent with previous development and management of an office building, a condominium project and a resort complex.

In addition to those actions listed above, Defendants also acted arbitrarily and capriciously towards Plaintiffs by maliciously and drastically increasing the undeveloped property assessment for the Harper Property from $33,210 to $157,500 to harass Plaintiffs and enacting a fast food restaurant restriction ordinance per Defendant McNally's suggestion for the sole purpose of "blocking" Plaintiffs' ability to construct a fast-food ordinance on the proposed hotel site, which at one time was the only reasonable alternative to development. Defendants told Plaintiffs that no permit was necessary before performing a curb-cut, but Defendants Leidlein and Owczarzak reversed that order position when they became aware that Plaintiffs had commenced construction under the special permit by ordering Plaintiffs to cease cutting the curb, which was obviously done for the purpose of obstructing Plaintiffs' ability to commence construction.

On February 24, 1993, upon Defendants' Motion to Dismiss, the United States District Court, Eastern District of Michigan dismissed Counts I, IV, V, and VI but refused to dismiss Count II (Equal Protection) and Count III (Substantive Due Process) asserting that "plaintiffs, again, have at least alleged certain things, arbitrary, capricious conduct, which is a fact matter that may shock the conscience." (See Order Granting In Part, Denying In Part Defendants' Motion to Dismiss and transcript, A-10–A-14.)

On August 25, 1993, upon hearing Defendants' Motion for Summary Judgment on the remaining Counts II and III, the District Court granted Defendants' Motion which dismissed Plaintiffs' claims in their entirety, stating:

> "As to Count 3, which is the 1983 claim dealing with denial of substantive due process, again the Court believes that Plaintiffs have not and really cannot prove the defendants' actions regarding Plaintiffs' hotel project were so irrational that they would shock the consciousness of the Court, which is the test that the Court has to apply.
>
> As I say, I have got a lot of feelings for the plaintiffs. I wish they could develop their property, but the Court just doesn't believe it reaches the level of this kind of constitutional violation of almost every case that I have been able to read would dictate.
>
> Therefore, the Court grants the motion for summary judgment."

(See Order and transcript, A-6–A-9.)

On appeal before the Sixth Circuit Court of Appeals, the Court affirmed the District Court's Holding, stating:

> "To prevail on a substantive due process claim, a plaintiff must show that the government entity is guilty of 'arbitrary and capricious action in the strict sense.' *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992). This requires a showing that the decision rendered was without any rational basis. *Id.* The plaintiff must be able to demonstrate that the alleged irrationality of the City was such that it 'shocks the conscience' of the court. *Id.* at 1222. Appellants make no allegations which can be said to 'shock the conscience'." (See Sixth Circuit Opinion, A-1–A-5.)

REASONS FOR GRANTING THE WRIT

I.

THE SUBSTANTIVE DUE PROCESS TEST IS NOT BEING APPLIED CONSISTENTLY AMONG THE CIRCUITS. PROPERTY OWNERS ACROSS THE COUNTRY HAVE DIFFERENT ACCESS TO FEDERAL COURTS DUE TO VARYING TESTS BETWEEN THE CIRCUITS. THE LAW NEEDS TO BE CLARIFIED AND UNIFIED.

A. Many Circuits Have Noted In Their Opinions That There Is A Lack Of Decision By The Supreme Court Regarding The Issue Concerning Land-Use Civil Rights Litigation.

Schaper v. *City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987) declares that substantive due process is an area of law "famous for its controversy, and not know for its simplicity." *Id.* at 716.

The Sixth Circuit in *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), states:

> "Our research further reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning . . . The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." Id., 1214, 1217.

Walz v. *Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995), Pet. Cert. Filed 4/20/95, states that the issue of whether substantive due process protects state-created property rights has not yet been addressed by the Supreme Court. *Id.* at 169.

Reich v. *Beharry*, 883 F.2d 239, 243 (3d Cir. 1989) states that the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court. *Id.* at 243.

For a review of how the circuits are divided on these questions, please refer to *Pearson* v. *City of Grand Blanc*, *supra* at 1217-1219, and below.

B. The Circuits Have Made Inconsistent Interpretations Of What Substantive Due Process Violations Entail Land-Use Litigation.

The First Circuit does not generally recognize a substantive due process violation in land use litigation. *PFZ Properties, Inc.* v. Rodriguez, 928 F.2d 28, 31 (1st Cir. 1991), cert. granted, 112 S.Ct. 414 (1991). Because if the substantive due process' "virtually standardless reach," the First Circuit has held that a substantive due process claim is violated only where the evidence was "*sufficiently conscious-shocking*" or "*shocking or violative of universal standards of decency*," *Licari* v. *Ferruzzi*, 22 F.3d 344, 348 (1st Cir. 1994); *Amsden* v. *Moran*, 904 F.2d 748 (1st Cir. 1990), cert. denied, 498 U.S. 1040 (1991), i.e., "where state actors engage in extreme or intrusive physical contact." *Souza* v. *Pina*, 1995 WL 238785, ___ F.3d ___ (1st Cir. 1995).

The Second Circuit has determined that the issue of whether the denial of a permit was a violation of the substantive due process clause rested upon whether the decision was for arbitrary or irrational reasons. *Walz* v. *Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995), Pet. Cert. filed 4/20/95. *Brady* v. *Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988).

The Third Circuit has declared that the substantive due process clause was intended to protect the individual from the arbitrary exercise of the powers of government, or when government deliberately and arbitrarily abused its power, *Midnight Sessions, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 683 (3rd Cir. 1991); *Bello* v. *Walker*, 840 F.2d 1124, 1129 (3rd Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 134, 102 L.Ed.2d 107 (1988), i.e., evidence from which a fact-finder could reasonably conclude that certain council members "improperly

interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permit." *Id.* According to *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Third Circuit will grant relief on the basis of substantive due process where the zoning decision is irrational in the strict sense, or prompted by invidious political or discriminatory motives. *Id.* at 1218. The factual question for the jury would be whether the City denied the application due to some improper motive such as whether the City denied applications due to some improper motive such as political motivation, racial animus, *Midnight Sessions*, at 683, or an individual's personal or financial interest. *Deblasio* v. *Zoning Board of Adjustment*, 1995 WL 248792, ___ F.3d ___ (3rd Cir. 1995).

The Fourth Circuit has stated that where there is fairly alleged a basis for finding either abuse of discretion, arbitrariness, unfairness or caprice in a zoning administrator's refusal to issue a building permit, a Fourteenth Amendment claim is properly stated and where the zoning action is "tainted with fundamental procedural irregularity, racial animus, or the like" it amounts to an actionable denial of due process. *Scott* v. *Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

The Fifth Circuit has found that arbitrary deprivation of zoning implicated invasion of Fourteenth Amendment Due Process rights. *Shelton* v. *City of College Station*, 754 F.2d 1255 (5th Cir. 1985). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Fifth Circuit views with strong disfavor the idea of federal courts being drawn into local zoning disputes, and classifies all zoning actions, even those pertaining to an individual piece of property, as legislative. *Id.* at 1219.

The Sixth Circuit has applied the "shock the conscience" standard to determine whether there is a sub-

stantive due process violation is a land-use situation. More specifically, it has stated:

> "Although the 'shock the conscience' terminology is more apt for cases involving physical force, it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to underscore the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law . . . referring to *extreme irrationality — after all we would not expect a planning commission or board of adjustments to be pumping the landowner's stomach* . . . Under the foregoing principles, it is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process." (emphasis added). *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992).

The Seventh Circuit has recognized that an arbitrary denial of a building permit may be the basis for a § 1983 action. *Scudder* v. *Town of Greendale*, 704 F.2d 999 (7th Cir. 1983). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Seventh Circuit holds that action could be set aside only if it "invidious or irrational." *Id.* at 1219.

The Eighth Circuit has held that the denial of a building permit may give rise to a substantive due process claim and that the applicants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily by imposing an unconstitutional condition on the granting of the permit. The court further held that the availability of state remedies for a substantive constitutional violation does not preclude recovery under § 1983. *Littlefield* v. *City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Eighth Cir-

cuit judges are in disagreement among themselves as to the correct approach to federal review of local zoning and has stated that the issue of whether a substantive due process claim may arise from a denial of a zoning permit is an open question in that circuit. *Id.* at 1219.

The Ninth Circuit has found that the City's arbitrary decision to reject the plan despite the developer's full compliance with the requirements for a building permit violated his substantive due process rights. *Bateson* v. *Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

The Tenth Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, "imposes a strict property right test similar to the Second Circuit. If that test is met, it will consider whether the zoning was arbitrary and capricious." *Id.* at 1219.

The Eleventh Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, has an approach similar to the Ninth Circuit. *Id.* at 1219.

The District of Columbia Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, applies a very deferential standard of review under substantive due process, holding that "only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under Section 1983." *Id.*, 1219.

It is not fair for property owners in varying parts of this country to be treated differently by federal courts, when bringing suit to redress violation of substantive due process. The time has come for this Court to address that issue and clarify the law.

❧ ❧ ❧

II.

THE "SHOCK THE CONSCIENCE" TEST IS A BAD TEST IN LAND USE CIVIL RIGHTS LITIGATION. AN APPROPRIATE TEST WOULD BE THE "ARBITRARY AND CAPRICIOUS" TEST.

A. The Sixth Circuit And First Circuit Have Applied The "Shock The Conscience" Test Set Forth In *Rochin* v. *California*, A Physical Abuse Case, To Land-Use Litigation.

The Sixth and First Circuit rely on *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183 (1952) when they apply the "shock the conscience" test to land use litigation. That case involved a narcotics arrest conducted by police officers by using what amounted to be "excessive force." The Court based its analysis and decision limited to the context of criminal proceedings and it did not indicate that its decision and shock the conscience' test were to be used in civil matters and/or non-violent constitutional deprivations. In its holding, the Supreme Court concluded:

> "we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience . . . to offend even hardened sensibilities. There are methods too close to the rack and screw to permit a constitutional differentiation . . . They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct." *Id.* at 172, 173; 190.

The Sixth Circuit even noted problems associated with applying the "shock the conscience" test to situations other than excessive force. In *Braley* v. *City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990), the court noted:

> "Applying the 'shock the conscience' test in an area other than excessive force . . . is problematic. Not only are there fewer instances in the case law, but the 'shock the conscience' test is not as uniformly applied to cases where excessive force or physical brutality is not the basis of the claim. The 'shock the conscience' standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court's power to interpret objectively where there is a dearth of previous decisions on which to base the standard. We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity . . . Therefore, because the present case does not concern physical abuse, we are reluctant to apply the 'shock the conscience' standard and decline to do so." *Id.*, quoted by *Mansfield Apartment Owners* v. *City of Mansfield*, 988 F.2d. 1469, 1478 (6th Cir. 1993).

Pearson v. *City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992) stated that "the 'shock the conscience' terminology . . . is more apt for cases involving physical force. In doing so, if found that such circumstances would, in fact, be 'extremely rare.'" *Id.* at 1222.

B. The "Shock The Conscience" Test Is Not Appropriate For Land Use Cases.

Writers recently have criticized the Sixth Circuit's *Pearson* holding of "shock the conscience" test in land use cases.[4]

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4 Robert E. Roberts, Professor of Law at Wake Forest University School and Thomas C. Shearer wrote "Land-Use Litigation: Takings and Due Process Claims," *Urban Lawyer*, Vol. 24, No. 4, Fall 1994; Donald D. Dripps, Professor of Law at University of Illinois wrote "At the Borders of Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense,"

(concluded on page 16)

Roberts and Shearer discuss the "shock the conscience" test applied in *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991), cert. granted, 112 S.Ct. 414 (1991), noting recent rejections of land-use claims by the lower courts that are not found "worthy of the time of the federal bench." They stated, "if the Supreme Court is dissatisfied with the trend toward total deference, the Court might tighten up on use of the conceivable basis test and impose some burden on governmental authorities to justify delay." (emphasis added) *Id.* at 838 and 839. The authors refer to other recent decisions such as *Elsmere Park Club Ltd. Partnership* v. *Town of Elsmere*, 771 F.Supp. 646 (D.Del. 1991) and *Corn* v. *City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D. Fla. 1991) whereby the district courts found violations of substantive due process claims in land-use disputes without referring to the "shock the conscience" standard.

Professor Dripps argues that the "shock the conscience" test for substantive due process claims is far too narrow because it approves of police conduct that is unreasonable and offensive, so long as it does not shock the conscience. *Id.* at 261. He states:

> "The outrageousness formula is irreconcilably at odds with the selective incorporation decisions . . . Only in the context of police practices not involving searches, seizures, or interrogations, however, has the Court derived the requirement of outrageousness for due process violations . . . *In sum, as a test of substantive rights the shock-the-conscience standard is inconsistent with just about every other aspect of the constitutional law*

(*continued from page 15*)

***University of Illinois Law Review*, Vol. 1993, No. 2, p. 261; Richard H. Fallon, Jr., Professor of Law at Harvard Law School, wrote "Some Confusion About Due Process, Judicial Review, and Constitutional Remedies," *Columbia Law Review*, Vol. 92, No. 2 (March 1993), p. 309.**

> *of criminal procedure. The test is also far too narrow from a policy standpoint.* The *Rochin* Court self-consciously sought to articulate a very narrow exception to the *Wolf* rule, which the Justice had announced but three years before. Borrowing the restrictive language as the test of substantive rights implies a narrow, grudging view of what rights the judges ought to recognize. The intensity of the condemnation required by the *Rochin* test is wholly inappropriate for a post-Holocaustal age. Murder, torture, and slavery are the familiar features of recent history. Nowadays, 'hardened sensibilities' are shocked by nothing. Few of us are shocked or outraged . . . The current due process test draws from this premise the conclusion that these tactics are permissible even without a scintilla of suspicion that the targets are engaged in criminal activity. . . . The constitutional text, its history, or Supreme Court precedents commanded this result, that would be one thing. Text, history, and precedent, however, command nothing of the sort. The *shock-the-conscience formulation should be abandoned.*" *Id.* at 270-272 (emphasis added).

Professor Fallon cites the confusion in the application of a due process claim, stating:

> "Substantive due process doctrine reflects the simple but far-reaching principle that government cannot be arbitrary. Government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable relationship between government's ends and its means . . . The ultimate commitment of the law of due process remedies — analogous to that of procedural due process — is to create schemes and incentives adequate to keep government, overall and on

> average, tolerably within the bounds of law." *Id.* at 310-311.

Fallon sets forth that current problem of the substantive due process doctrine under current law is the uncertainty about which government actions are subject to substantive due process scrutiny and about which constitutional standards should apply asking: "Are isolated acts of government officials — alleged constitutional torts — challengeable on substantive due process grounds?" and "What is the test for identifying substantive due process violations?" *Id.* at 312-313.

Fallon recognizes that substantive due process claims are widely viewed as the most problematic category in constitutional law. *Id.* at 314. Fallon reviewed various decisions for establishing the applicability of substantive due process principles, under *Rochin* v. *California*, *supra*, against *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), (which both found a substantive due process violation) recognizing the former used the "shock the conscience" standard whereas the later set forth that the government acted without a basis for its finding that the applicant failed to meet the required standards for admission to the bar. His conclusion was that no agreed framework has emerged for identifying when relatively isolated official acts offend substantive due process. Fallon stated:

> "The Court has established that conscience-shocking action violates due process, and, on one view, government action shocks the conscience only then it trenches on a fundamental right. . . . Involving what the Court has classified as non-fundamental liberty and property interests, perhaps the most familiar formulation suggests that officials must not engage in 'arbitrary' conduct. But the Supreme Court has not held that all arbitrary official conduct violated the Constitution, and it suggests in one recent case that conduct could be 'arbitrary' . . . in the con-

> stitutional sense only if it shocked the conscience. The Court has not taken so narrow of a view in the past, however, and it has upheld substantive due process claims in subsequent cases without adverting to the 'shock the conscience' standard . . . In an entirely understandable reaction, the Supreme Court in recent years has more often sought to avoid than to answer the question of what duties of care substantive due process imposes." *Id.* at 324-326.

C. The Supreme Court Should Adapt The "Arbitrary And Capricious" Standard Set Forth By The Majority Of Circuits As The Appropriate Standard For Substantive Due Process Violations In Land-Use Litigation.

The *Deblasio* Court found it hard-pressed to find a property interest more worthy of substantive due process protection than ownership. In the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff should state a substantive due process claim where he or she alleges the decision limiting the intended land use was arbitrarily or irrationally reached. *Id. Deblasio* v. *Zoning Board of Adjustment* at 6.

Finding property interests *worthy of federal court jurisdiction*, the *Deblasio* Court applied the "deliberate and arbitrary abuse" standard rather than the "shock the conscience" standard. *Plaintiffs assert that Deblasio's standard is the appropriate standard that this Court should adapt for land use litigation under the substantive due process clause because it protects property interests more accurately as provided for under the United States Constitution.*

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III.

DEFENDANTS' ACTIONS IN THIS CASE CREATE GENUINE ISSUES OF MATERIAL FACT SHOWING VIOLATIONS OF PLAINTIFFS' RIGHTS TO SUBSTANTIVE DUE PROCESS, UNDER ANY REASONABLE TEST.

A. Standard Of Review

Since the standard of review before the Sixth Circuit Court of Appeals was *de novo*, the appellate court was permitted to draw its own inferences and legal conclusions from the record presented. *Landcaster Glass Corporation* v. *Philips ECG, Inc.*, 835 F.2d 652, 658 (6th Cir. 1987).

De novo review applies to questions of law, *In re Edward M. Johnson & Assoc., Inc.*, 845 F.2d 1395, 1398 (6th Cir. 1988), including but not limited to statutory interpretation, *United States* v. *Hans*, 921 F.2d 81, 82 (6th Cir. 1990) and mixed questions of law and fact, *Blackburn* v. *Foltz*, 828 F.2d 1177, 1181 (6th Cir. 1987), cert. denied, 485 U.S. 870 (1988). The district court's decision should have been sustained only if there was no genuine issue of material fact and the moving party was entitled to judgment as a matter of law. F.R.C.P. Rule 56(c) 28 U.S.C.A.; *City of Mount Clemens* v. *United States, Envtl. Protection Agency*, 917 F.2d 908, 914 (6th Cir. 1990).

B. The Case Should Not Have Been Dismissed On A Rule 56 Motion As There Are Genuine Issues Of Material Facts Of Substantive Due Process Violations.

The present case is very similar to cases in other circuits which declared such acts as violations of substantive due process.

As compared to *Walz* v. *Town of Smithtown*, *supra*, where the language of the ordinance was such that so long as there was no discretion to deny a permit or refuse to issue another permit so long as the applica-

tion was met the expressed code requirements, *id.* at 168, the City of Harper Woods, likewise, did not have discretion to deny Plaintiffs' Special Use Permit that complied with the City Ordinances and had been previously granted where there was no substantial change of circumstance and Section 10-164 of the City Ordinance did not allow for discretion.

As compared to *Deblasio* v. *Zoning Board of Adjustment, supra*, where evidence existed that the permit was denied based upon minor "technicalities," that certain council members had *personal animosity* towards one of the plaintiff's employees and that a fact-finder could conclude that certain council members improperly interfered with the process by which the City issued permits, that they did so for partisan political or personal reasons unrelated to the merits of the application for the permit and that the governmental decision in question impinged upon a landowner's use and enjoyment of property, *id.* at 8, Defendants committed similar acts towards plaintiffs in the present case.

As compared to *Scott* v. *Greenville County, supra*, where the defendants intervened with the developer's property and due process rights differently than it had done to other applicants in the past and such *intervention into the process was motivated by a lack of impartiality towards him, and was such a departure from established practice and applicable law that he was denied due process*, Defendants clearly were motivated by and treated Plaintiffs with impartiality and biased treatment.

As compared to *Bello* v. *Walker, supra*, where there was evidence that the City denied the permit for purely personal and political reasons, Plaintiffs provided ample evidence that Defendant McNally was motivated by personal and political reasons. He even expressed in his deposition that he did not believe he needed to be unbiased towards Plaintiffs.

As in *Bateson* v. *Geisse*, the developer applied for a building permit for a condominium project and thereafter modified his plan to conform with the City officials' objections. The City continued to reject his claim. The City arbitrarily decided to reject the plan despite the developer's full compliance with the requirements for a building permit. *Id.* at 1303.

As compared to *Elsmere Park Club Ltd. PRTP* v. Town of *Elsmere*, 771 F.Supp 646 (D.Del. 1991), where the town's actions of denial of a permit constituted unlawful delay in violation of substantive due process, Defendants' actions likewise caused extensive delays for the last ten years that Plaintiffs have attempted to construct the hotel project.

As compared to *Corn* v. *City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D. Fla. 1991), where the City denied a special use permit, expressed warrantless concerns for increased traffic, noise and other adverse effects allegedly that would be caused by the particular project, targeted only that particular project use for limitation, leaving a number of uses that arguably cause more traffic, noise, and air pollution and *was motivated solely by an irrational desire to thwart the plaintiff's plans,* Defendants acted similarly to Plaintiffs.

In this case the substantive due process claim was dismissed by the District Court on a Rule 56 motion, that there is no genuine issue on a material fact, applying the "shock the conscience" standard for substantive due process violations. In the Court of Appeals, Appellees confused the facts by arguing facts that were not in the record, citing discretionary standards when there were none and belittling Plaintiffs' efforts to start the hotel project going. Fighting for their day in court is very difficult when Plaintiffs must "shock" the court in order to have a trial and Plaintiffs' day in court.

In their Court of Appeals Brief, Appellees argue Plaintiffs had not complied with the ordinance and that

Appellees had discretion to deny the reapplication for a new approval of the special land use permit. Nothing could be further from the truth.

There was full compliance with all City Ordinances. On a number of occasions, including the one last time just before the City Council's consideration on October 5, 1992, the Planning Commission had approved the site plan and recommended approval of this project. Further, as appears from the statement of a City Council Member in the minutes of the October 5, 1992 meeting, the City Manager and the City Attorney both recommended approval of this application, based on full compliance with City Ordinances.

It must be remembered this project had been previously approved by the City Council. A one year period of time to start the project had expired. Extension of that one year had twice been denied. At the City's instructions, Plaintiffs reapplied for the special land use approval, having to submit all documents and go through the same procedure again. The City Council's approval of May 5, 1991 demonstrates there was full compliance with City Ordinances.

Cities and towns routinely provide that special land use approvals or site plans expire if construction does not start within one year of the approval. The basis for enforcing this limitation is to protect the City's ability to enforce any new ordinance standards or regulations that were adopted during the one year period. With the approval there was a vested right not to comply with new requirements. For the one year period after that, it is only fair a new development comply with new ordinances, standards and regulations.

This is the only possible legal basis for denying Plaintiffs' two requests for extensions of the one year period and their reapplication for reapproval of the special land use. In this case, there were no new ordinances, standards or regulations. Therefore, to deny Plaintiffs

the right to proceed, without a change of circumstances, constituted "arbitrary and capricious" denial of Plaintiffs' right to substantive due process.

There were in fact no new circumstances from the approval Plaintiffs previously had. Plaintiffs had a right to develop the property which was unfairly, arbitrarily and capriciously taken from them, to serve the personal political whims of Defendants.

The context of all of this further demonstrates how Plaintiffs were beat down to a victim's status after the involvement of Defendant McNally. The City had encouraged Plaintiffs to pursue the hotel project through various acts, such as a special resolution adopted in May 1991, which induced Plaintiffs to incur large out-of-pocket expenses of approximately $500,000.

After entrance of Defendant McNally on the scene, there was a long series of needless and unreasonable and highly expensive delays and obstacles erected by Defendants. After receiving the special land use approval on May 5, 1991, Plaintiff Handlos suffered a sudden loss of hearing, his personal affliction, which was a sufficient basis for the extension. Disregarding that, Defendants continued to make life difficult for him. Because of his deafness, he was not able to put together the financing and get the project started on a timely basis. In January 1992, Plaintiffs requested an extension of the one year approval period, and were denied. As the one year was about to expire, Plaintiff Handlos panicked and tried to protect his rights by personally going onto the property and starting construction. No new City permit was necessary to make the curb cut and start construction. Rather than understanding Plaintiffs' difficulties, Defendants played "hardball," demanding an exorbitant bond for 5% of the value of the completed buildings. Normally bonds are only filed to ensure completion of public improvements, not the completion of buildings which the City will not own.

In this litigation, Defendants have trivialized Plaintiff Handlos' attempt at construction as a demonstration this man could not possibly finance a hotel construction. This is entirely insensitive and unfair. There was no evidence that he could not complete the project if he had only been given a fair chance to start it.

The facts at trial will show that had Defendants recognized Plaintiffs' valid legal rights and Plaintiffs had reacted reasonably in respect to the request for extensions of the one year period and had not created other road blocks, the hotel project would have gotten off the ground. When someone is afflicted with deafness and then is ambushed and beat down by the City, it can be understood why the circumstances for Plaintiffs went from bad to worse. Plaintiffs did not have a fair chance and they should now have their day in court to redress the arbitrary and capricious actions of the Defendants in this case.

There are genuine issues of material fact under any reasonable standard for determining whether there are violations for substantive due process of law.

Respectfully submitted,

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Dated:
June 5, 1995

Supreme Court, U.S.
(2) FILED
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No. _____

In The
Supreme Court of the United States
October Term, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS,

Petitioners,

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council for City of Harper Woods, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPPENDIX TO PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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• • •

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed March 7, 1995)

(WOODPOINTE INN ASSOC., L.P., et al., Plaintiffs-Appellant[*s*], v. CITY OF HARPER WOODS, et al., Defendants-Appellees — No. 93-2266; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: KEITH and NELSON, Circuit Judges, and HORTON, District Judge.*

PER CURIAM:

Plaintiffs-Appellants, Thomas A. Handlos ("Handlos"), Lucille Handlos, and Woodpointe Inn Associates ("Woodpointe," collectively "Appellants") appeal from the district court's order granting summary judgment in favor of the City of Harper Woods ("City") and its co-defendants (collectively "Appellees"). For the reasons that follow we **AFFIRM**.

I. STATEMENT OF CASE

This § 1983 action arises from a local land use dispute. Appellants sought to build a hotel on a vacant commercial lot, located near I-94 in the City of Harper

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*** The Honorable Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.**

Woods. Appellants were required by City Ordinance to obtain a special use permit before construction of the hotel could begin. In May 1991, such special use permit was granted, provided certain conditions were met by Appellants.

Appellants failed to commence construction under the terms set forth in the permit. The City denied their request for an extension of time to complete construction. In October 1992, the City denied Appellants' reapplication for a special land use permit. Appellants thereafter, on October 5, 1992, filed a complaint in district court against the City alleging six counts: 1) a taking of property without just compensation; 2) violation of their right to equal protection under the law; 3) violation of their right to substantive due process; 4) deprivation of procedural due process; 5) unconstitutional application of municipal ordinances; and 6) conspiracy.

Defendants filed a Motion to Dismiss for failure to state a claim. On March 2, 1993, an Order was entered by Judge Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, granting Defendants' Motion, in part, and dismissing Counts I, IV, V and VI. The remaining claims for violation of Appellants' right to equal protection and substantive due process, under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, were not dismissed pending the discovery.

In July 1993, after discovery was completed, Defendants filed a Motion for Summary Judgment regarding the remaining two claims. Judge Friedman heard oral argument from both parties on August 31, 1993, and granted the Defendants' Motion for Summary Judgment on the remaining claims of substantive due process and equal protection violations.

This timely appeal followed.

II. FACTS

Handlos purchased a vacant parcel of land (the "Property") in the City of March 1981, with the stated purpose of constructing a hotel thereon. The Property at all relevant times was zoned for commercial development. Appellees assert, without dispute, that under Section 10.164 of the City Zoning Ordinance, hotels are permitted in a general business district only after special approval, making the grant of a special use permit discretionary, rather than mandatory. Between 1981 and 1991 Handlos approached the City on numerous occasions proposing various development options for the Property.

In January 1985, Plaintiffs requested a special land use permit to develop the hotel. The permit was denied because the site plan, according to the City, did not comply with the requirements of the City's zoning ordinance. In December of that year, the City Council rejected a second request for essentially the same reasons as the first denial.

In 1986, Appellants submitted a proposal to develop a two-story office building. The initial proposal was approved by the City Planner and the Planning Commission. Inexplicably, the project was never built. In 1988, Appellants submitted a plan for a thirty-eight unit senior citizen housing development. This project, too, was never initiated.

In July 1990, Appellants again sought a special land use permit to construct a hotel on the Property. The City Council ultimately voted to approve the special land use permit on May 6, 1991, subject to certain conditions. The conditions imposed by the City were not extraordinary.

After gaining approval, subject to the conditions, the Appellants failed to develop the property. In August 1991, Appellants sent a letter to the city indicating that the size of the project would be reduced. Even though

Appellants were given a year, rather than the customary six-months to begin construction, no construction was started on the Property. On January 10, 1992, Appellants requested a one year extension of the time allowed to begin construction. This request was denied, and a subsequent request for an extension was denied.

With the deadline to begin construction fast approaching, Handlos began doing ground work on the Property. Mr. Handlos, the general partner of Woodpointe and sole known financier of the multi-million dollar project, began construction himself by wielding a sledge hammer in an effort to construct a curb cut. Appellees contend this activity brought into question his ability to properly finance the project.

Appellants' special land use permit expired on May 6, 1992. They were so notified in a letter that same day. Appellants reapplied for a special land use permit in June 1992. Prior to the City Council's determination of the latest request, Appellants filed suit in district court.

III. DISCUSSION

A. Standard of Review

This court reviews a district court's grant of summary judgment *de novo*. *Kinnie* v. *U.S.*, 994 F.2d 279, 282 (6th Cir. 1993). In reviewing a motion for summary judgment, we must consider the evidence in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Kinnie*, 994 F.2d at 281.

B. Equal Protection

Appellants correctly point out that the threshold element of an equal protection claim is disparate treatment. In order to establish an equal protection claim, Appellants must show that the alleged wrong was directed at them as a member of a class or group, singled out for discriminatory treatment. *Joyce* v. *Mavro-*

mantis, 783 F.2d 56, 57 (6th Cir. 1986). Where there is no allegation that a fundamental right has been infringed upon or that Appellants belong to a suspect class, the Defendants' actions are subject to a rational basis test. *Lakewood Ohio Congregation of Jehova's Witnesses, Inc.* v. *Lakewood*, 699 F.2d 303, 308 (6th Cir.) *cert. denied*, 464 U.S. 815 (1983). Governmental entities are accorded wide latitude in regulation of their local economies. *Curto* v. *City of Harper Woods*, 954 F.2d 1237, 1244 (6th Cir. 1992).

In order to prevail on an equal protection claim under § 1983, the Appellants must establish that they were the victims of intentional or purposeful discrimination. *See Gutzwiller* v. *Fenik, et al.*, 860 F.2d 1317, 1325 (6th Cir. 1988). In the instant case, Appellants fail to bring forth any relevant evidence that Appellees intentionally discriminated against them.

C. Substantive Due Process

Appellants next argue they were denied substantive due process. To prevail on a substantive due process claim, a plaintiff must show that the government entity is guilty of "arbitrary and capricious action in the strict sense." *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992). This requires a showing that the decision rendered was without any rational basis. *Id.* The plaintiff must be able to demonstrate that the alleged irrationality of the City was such that it "shocks the conscience" of the court. *Id.* at 1222. Appellants make no allegations which can be said to "shock the conscience."

IV. CONCLUSION

Upon careful review of the record, the briefs submitted by the parties and oral argument, we **AFFIRM** the decision of the Honorable Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, granting summary judgment in favor of Defendants-Appellees.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated September 1, 1993)

(WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, THOMAS A. HANDLOS and LUCILLE HANDLOS, Plaintiffs, vs. CITY OF HARPER WOODS, JAMES R. HALEY, JAMES E. LEIDLEIN, GERARD OWCZARZAK, RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA and ORESTO J. VELARDO, Defendants — Civil Action No. 92-CV-75936-DT; HON. BERNARD A. FRIEDMAN)

On August 31, 1993, this matter came before the court on defendants' motion for summary judgment. The court has reviewed the parties' written submissions and heard oral argument. For the reasons stated on the record,

IT IS ORDERED that defendants' motion for summary judgment is granted.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: SEPTEMBER 1, 1993
Detroit, Michigan

JUDGMENT

The court has granted defendants' motion for summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, entered for defendants and against plaintiffs.

JOHN P. MAYER
CLERK OF COURT

/s/ JUDIE BIRDSALL
DEPUTY CLERK

Approved: /s/ BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

Dated: SEPTEMBER 1, 1993

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have on this date sent by first-class mail a copy of the foregoing Judgment and Order Granting Defendants' Motion for Summary Judgment to the following persons at the addresses indicated:

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/s/ Madelyn Peruski
Secretary to Judge Friedman

Dated: SEPTEMBER 1, 1993

OPINION ON MOTION FOR SUMMARY JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of August 31, 1993)

(WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, a Michigan Limited Partnership, and THOMAS A. HANDLOS and LUCILLE HANDLOS, individually, Plaintiffs, -vs- CITY OF HARPER WOODS, a municipal corporation; JAMES R. HALEY, Mayor of City of Harper Woods; JAMES E. LEIDLEIN, City Manager for Harper Woods; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council for City of Harper Woods; jointly and severally, Defendants — Case No. 92-CV-75936-DT; Hon. Bernard A. Friedman)

Proceedings had in the above-entitled cause before the HONORABLE BERNARD A. FRIEDMAN, United States District Court Judge, at 235 United States Courthouse, Detroit, Michigan, on Tuesday, August 31, 1993.

APPEARANCES:

For the Plaintiffs: BARBARA J. BROWN (P44320), Barbara J. Brown, P.C., 315 Hunters Square Circle, 31555 West 14 Mile Road, Farmington Hills, MI 47334;

For the Defendants: JULIE McCANN-O'CONNOR (P38484), O'Connor, DeGrazia & Tamm, P.C., 525 North Woodward Avenue, Suite 1300, Bloomfield [*Hills*], MI 48304.

* * *

(9) * * * THE COURT: In this matter, the Court, as it said, has had an opportunity to study the briefs; and it was briefed very well by both sides and the Court is very familiar with the case. It is not the first time that I

have seen it in this context and am trying to give the plaintiffs all the benefit that I can.

The Court still believes that the motion must be granted as to Count 2, which was the 1983 claim for equal (10) protection. The Court is of the belief that the motion again should be granted.

The Court believes that the relation to this particular claim, that Plaintiffs have not offered evidence that the defendants were motivated by discrimination. There just simply isn't that kind of evidence existing, and therefore the Court has to grant that part of it.

As to Count 3, which is the 1983 claim dealing with denial of substantive due process, again the Court believes that Plaintiffs have not and really cannot prove the defendants' actions regarding Plaintiffs' hotel project were so irrational that they would shock the consciousness of the Court, which is the test that the Court has to apply.

As I say, I have got a lot of feelings for the plaintiffs. I wish they could develop their property, but the Court just doesn't believe it reaches the level of this kind of constitutional violation of almost every case that I have been able to read would dictate.

Therefore, the Court grants the motion for summary judgment. The motion is to be granted on Counts 2 and 3, which were the only counts remaining. There is no reason to get into governmental immunity; therefore I won't rule on that at this point, since there is no reason.

I will enter an Order to that effect. Thank you.

(Certificate of Reporter Omitted)

ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated March 3, 1993)

(WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, THOMAS HANDLOS and LUCILLE HANDLOS, Plaintiffs, vs. CITY OF HARPER WOODS, JAMES R. HALEY, JAMES E. LEIDLEIN, GERARD OWCZARZAK, RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA and ORESTO J. VELARDO, Defendants — Civil Action No. 92-CV-75936-DT; HON. BERNARD A. FRIEDMAN)

On February 24, 1993, this matter came before the court on defendants' motion to dismiss, filed December 21, 1993. The court has reviewed the parties' written submissions and heard oral argument. For the reasons stated on the record,

IT IS ORDERED that defendants' motion to dismiss is granted as to Counts I, IV, V and VI.

IT IS FURTHER ORDERED that defendants' motion to dismiss is denied as to Counts II and III.

IT IS FURTHER ORDERED that defendants' motion to dismiss based on immunity is denied.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: MARCH 2, 1993
Detroit, Michigan

DEFENDANTS' MOTION TO DISMISS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of February 24, 1993)

(WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, Plaintiff, v. CITY OF HARPER WOODS, et al., Defendant — CASE NO. 92-CV-75936-DT)

PROCEEDINGS had and taken in the above-entitled matter, before the Honorable BERNARD A. FRIEDMAN, United States District Court Judge for the Eastern District of Michigan, Southern Division, at U.S. Courthouse, 231 W. Lafayette, Room 235, Detroit, Michigan, on Wednesday, February 24, 1993, at or about 4:00 o'clock p.m.

APPEARANCES:

BARBARA J. BROWN, ESQ., Appearing for the Plaintiff;
JAMES T. TAMM, ESQ., Appearing for the Defendant.

* * *

(45) * * * THE COURT: Thank you. In relation to this particular matter, this is a Rule 12(b)(6) motion, which standard is different than that of the Rule 56 motion.

The Court has to look at the four corners essentially here, the pleadings. The Court will take them one at a time.

As to Count I, which is the allegations of unconstitutional taking, the Court will grant the motion.

The Court believes that this matter is not ripe at this time; that the defendants — strike that — that the plaintiffs had a duty and failed to apply for a variance, and cannot show that they have met the requisite criteria for preclusion of a[*n*] economically viable use of the property.

As to Count II, the Court — which is the equal process clause — the Court in this particular matter will deny the defendants' motion.

The Court believes that the plaintiffs do have standing to assert the rights of protected minority employees, potential employees, and at least have pled sufficiently allegations of arbitrary and capricious (46) denial of the permits. It appears that this allegation, however, is directed towards the city and not the individuals. I can't really tell.

As I say, this case was — was pled extensively, but it appears it was pled against the city, though it may have some significance in a minute.

As to Count III, substantive due process. The Court in this particular matter will also at this time deny the defendants' motion. The plaintiffs, again, have at least alleged certain things, arbitrary, capricious conduct, which is a fact matter that may shock the conscience. Again, the plaintiffs will be up to their proofs and I suspect we'll be revisiting some of these issues again.

As to Count IV, procedural due process. The Court believes that the motion of the defense should be granted.

The Court believes that from reading of the pleadings and so forth that the oppurtunity for a fair and meaningful hearing prior to the denial of the report appears to be apparent even based upon the attachments and everything else — that it appears to be apparent.

As to Count V, which deals with the ordinance. The Court will also grant that motion.

The Court believes that there's nothing that (47) would give rise to — and, again reading it in the light most favorable to the plaintiff — to nongovernmental legitimate interests or unreasonable means for advancing those interests.

As to the Count VI, which is the conspiracy under 1985. The Court will grant the motion in relation to this particular matter because the Court believes that the plaintiffs in this matter are not members of the class

suffering the discrimination that they allege and, therefore, it must be dismissed.

As to the governmental immunity portion — and we're really talking about the qualified immunity. The Court believes that qualified immunity in this particular matter extends to the executive conduct and that the defense in this matter has the burden of the good faith in relation to this matter.

However, the issue — and, again it's not clear. We may have to — anyhow, at this time the Court is going to deny it based upon the qualified immunity. But the issue — and you may want to clarify it somewhere down the line — if there are now other constitutional allegations against the individuals, then obviously qualified immunity would be moot.

And I think that, as to the equal protection, it appears the way it's pled, but I can't really tell and, (48) therefore, I think at this time I have to err in favor of the plaintiffs. But the way it's pled, at least at this point it appears to be a moot question because the only constitutional issue left is the equal protection. And, if that isn't against the individuals, then qualified immunity, as I say, is moot. But at least at this time, to recap, the following order will be entered:

1. As to Count I, the Court will grant it.

As to Count II, the Court will deny it.

As to Count III, the Court will deny.

As to Count IV, the Court will grant.

As to Count V, the Court will grant.

As to count dealing — not the count, but the issue dealing with governmental immunity, the Court will deny that at this time.

All the issues, of course, are denied without prejudice since this is a Rule 12(b)(6) motion.

Okay. Anything that I have not included that should be included? I think I've covered all the issues.

Yes?

MS. BROWN: On the six count of conspiracy, did you grant or deny that motion?

THE COURT: Conspiracy, I granted.
MS. BROWN: Okay.
THE COURT: Okay. Anything else?
(49) MR. TAMM: Thank You, Your Honor.
THE COURT: Good. Thank you. We'll do the order.
THE CLERK: All rise, please. This Court is in recess.
(matter concluded)

(Certificate of Reporter Omitted)

EXHIBITS ATTACHED TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed August 13, 1993)

(WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, THOMAS A. HANDLOS and LUCILLE HANDLOS, Plaintiffs, vs. CITY OF HARPER WOODS, JAMES R. HALEY, JAMES E. LEIDLEIN, GERARD OWCZARZAK, RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA and ORESTO J. VELARDO, Defendants — Civil Action No. 92-CV-75936-DT; HON. BERNARD A. FRIEDMAN)

–EXHIBIT F–
LETTER FROM JAMES McNALLY TO "NEIGHBOR"
(December 15, 1984)

Dear Neighbor December 15, 1984

A hotel project is being proposed for the triangular property where Harper crosses the freeway. The proposal also calls for demolishing several homes to create parking lots. Many of your neighbors oppose the plan; we ask you to join us in showing our opposition at a public hearing to be held by the Harper Woods City Council on Monday, January 7, 1985, at 7:30 p.m., at the Municipal Building, 19617 Harper.

The Project

The hotel, a five-story building called the "Woodpointe Inn," is being proposed by local real estate agent Thomas A. Handlos. According to the site plan filed with the city, it will include meeting rooms and a restaurant/lounge, in addition to 69 guest rooms. The structure

and some parking would be contained within the triangle.

Additional parking lots, however, would be located across Harper in the residential neighborhoods. The following homes would be torn down and the property used as parking lots: 20824 Ridgemont, and 20831, 20832 and 20847 Hollywood. Commercial buildings on Harper are not affected.

Access to and from the hotel would be from Northbound Harper only. Employees and guests would use sidestreets and alleys to get to the parking lots in the neighborhoods.

Our Objections

Many objections have been stated. Some of the common objections are:

1. A 5-story hotel does not fit within the general character of the neighborhood and will depress property values.
2. Traffic on Harper, which is bad enough already, will get worse.
3. Children crossing Harper will be endangered, as there is no traffic control.
4. A hotel would attract undesirable people and would place them in our neighborhoods via the parking lots.
5. The project is too big to fit in such a small space.
6. There will be increased noise day and night from traffic, activity in the parking lots, loading dock operations, and garbage trucks.
7. There is no guarantee that the hotel will be run by honest, considerate people or that future uses of the building will be acceptable to the neighbors.

8. It is unnecessary to tear down houses, especially when the developer could confine all parking on-site through the use of a parking structure.

9. Confused out-of-town drivers will not understand the traffic patterns, and will ignore one-way streets and pedestrian crossings.

10. A hotel would drain city services.

These are only a few of our objections. There are, of course, many other reasons to oppose the project.

Public Hearing

By law, the Council must conduct a hearing at which the public can express its views. To this point, the developer has been able to work closely with city officials to have his project approved. The residents have not had a similar opportunity. This is our chance to make our voices heard.

At the meeting, the Council will hear all sides of the argument. The Council must then determine whether to (1) approve the "special land use" which would permit Mr. Handlos to put a hotel on the triangle, and (2) approve the use of residential property as parking lots.

If we do not stop the project now, the Council will approve it and we will be unable to stop it later. We urge you to attend the public hearing and show your concern.

James N. McNally
20832 Ridgemont

-EXHIBIT J-

FLIERS AND BROCHURES PREPARED BY JAMES McNALLY
(December, 1984-January, 1985)

JAMES N.
McNALLY for COUNCIL

- Harper Woods resident since 1960; 34 years old
- Son of former Judge James N. McNally III and Joan (Mannino) McNally Eldest of Nine Children
- Attorney with office on Harper in Harper Woods; experienced in state and Federal trial and appellate courts
- Attended Tyrone Elementary School, Harper Woods Junior High School, Harper Woods High School; Graduated from Notre Dame High School
- Bachelor's Degree in Business Administration from Michigan State University (1979)
- Juris Doctor Degree from Detroit College of Law (1982)
- Former Law Clerk, Michigan Court of Appeals and Wayne County Circuit Court
- Member, American Bar Association, State Bar of Michigan. Michigan Library Association, Friends of Harper Woods Public Library
- President of Harper Wods Public Library Board of Directors
- Married to former Stathia Vitinaros; one child, Mary Elizabeth McNally

I am opposed to any merger of the police and fire departments. I do not believe a merger would save tax money, and I believe the specialized nature of each job mandates that fire fighters keep fighting fires, and police officers keep fighting crime.

Although in these financially difficult times the City must look for new and imaginative ways to raise money to maintain the high quality of services to which we are accustomed, I oppose the recent "garbage fees." I believe they are, in essence, new

taxes which violate the Headlee Amendment by denying you the opportunity to vote.

I possess a unique blend of academic achievements, community background, and professional experience. I hope you will elect me to the Harper Woods City Council so that I may represent your concerns on the Council. Although I disagree with some current City policies and practices, I pledge to work in a cooperative fashion to assure that Harper Woods remains the best place to live.

Jim McNally

Paid for by the Committee to Elect James N. McNally, Jr.,
20394 Harper, Harper Woods, MI 48225

Please vote Tuesday, November 5

WHO CARES ABOUT YOUR NEIGHBORHOOD?

JIM McNALLY DOES!

Your neighborhood has tradionally been underrepresented in Harper Woods city government. As a result, we have seen uncontrolled development create a dumping ground for unwanted businesses north of Vernier.

As a Ridgemont resident from 1984 to 1991, Jim McNally understands the frustration you feel about incessant car alarms and loud fast food restaurants with blaring drive-through speakers. He knows the dangerous traffic patterns and is concerned about the safety of your children. He has seen you beautify your homes only to find fast food wrappers strewn on your lawns.

Even as a private citizen, Jim McNally has worked to improve your neighborhood. He led the opposition to the proposed Hotel project on Harper six years ago. The Harper Woods City Council rejected the planned construction. Despite overwhelming community opposition, however, two council members voted to approve the project: Mayor James Haley and Councilwoman Virginia Michiletti. Both are presently running in this election.

In 1986 the hotel developer threatened to put a fast-food restaurant on his site if the hotel were rejected. Jim McNally suggested a new ordinance limiting the number of fast food restaurants near each other. The City Council approved that ordinance, and the developer's threat was blocked.

The developer returned to the City Council in 1991 with yet another hotel proposal. This time, the Council approved the project with a May 1992 deadline for commencement of construction. Mayor James Haley and Council members Virginia Michiletti, Victor Marrocco, and Richard Eisengruber voted for the project. *All four are running in this election.* When the developer later sought approval of a liquor license, the Council approved his request "above all others."

This City Council has ignored your opinions and your neighborhood. You deserve to have your voice heard. Election day is Tuesday, November 5. We urge you to get out and vote, *and to vote for Jim McNally.*

Paid for by the Committee to Elect James N. McNally, Jr.,
20394 Harper, Harper Woods, MI 48225

If you would like to show your support for these issues by posting a lawn sign for McNally for Council, please call 881-3798 and leave your name and address on our answering machine.

Thank you for voting . . .

JAMES N.
McNALLY
for
COUNCIL

- Attorney; resident since 1960
- Opposed to "garbage taxes"
- Against Hotel project
- Against merger of police & fire departments

Paid for by the Committee to Elect James N. McNally, Jr.,
20394 Harper, Harper Woods, MI 48225

-EXHIBIT GG-
EXCERPTED DEPOSITION OF BRANDON ROGERS
(June 22, 1993)

* * *

(43) * * * Q. Your statement that the plan almost exactly complies with the zoning ordinance, do you still agree with that statement, did it?

A. It probably did then and the most recent (44) plan that was submitted met the design standards in the zoning ordinance regarding setbacks and parking and building height, you know.

Q. Because my Exhibit Number 7 that I showed you, which is quite extensive, and I don't expect you to read it all, had quite a few issues raised by McNally, who was a City Council member. He stated several areas where the plan did not comply with the zoning ordinance, and my question to you is whether you believed the issues he raised to be significant enough to deny the project. And I'm going to go through just a couple of them. He mentioned that it was an unsanitary proposal. And with your review of the project, do you find anything unsanitary about this proposal?

A. I don't render that opinion. I refer it to the City Administration, DPW Director, and the City Engineer and they make that decision on the adequacy of sanitary sewage or storm water runoff.

Q. He also mentioned that the walls and the side yards had to be five feet from the property line.

MR. EADS: Object to the form and the foundation of that question and I don't believe it's within his province to testify in this regard. (45) Additionally, I don't think there's been an adequate foundation laid regarding these statements, when they were said, what they were in regards to. If you feel you can answer the question, please do.

A. I don't know what you're talking about ma'am.

Q. This issue was raised by you in December of 1984 where the newspaper said that you said there are two

minor variances; however, that the Planning Commission has recommended an approval of. One regards off-street loading spaces, two of which are smaller than the required size. The other concern is the side yard next to one of the parking lots, which would only be 7 feet instead of the required 10 feet. I can't see any good purpose that would be made by making it 10 feet.

A. That was the old plan.

MR. EADS: Subject to the obvious heresay objection.

A. That was the old plan back in '84 where there was off-street premises across Harper, where because of the size of the lots and the adjacent development it's quite possible that 7 versus 10 feet was a reasonable variance to allow efficient use of that parking lot. I don't believe (46) Mr. McNally was referring to that earlier plan, he was referring to the more recent plan where there was no off-premises parking and there were no side yard setback variances. That's the only thing I can surmise, because I don't know what you're reading from and I wasn't at the Council meeting and I can't recall what McNally said.

Q. From your experience working with the City has it always required strict compliance with the zoning ordinance?

MR. EADS: Object to form.

A. I recommend compliance, but in certain hardship cases a developer or property owner has the legal right to appeal for a variance from the Zoning Board of Appeals.

Q. Did you review the plan — strike that. I have a quote from the East Side Advertiser Times dated October 28, 1991 where you were reported to have said that you recommended the Planning Commission pass the new proposal. Quoting, "In my report I am going to recommend the plans be passed. As far as I am concerned, it meets every ordinance's standard set by the City." Do you recall making that statement?

A. I was referring to the zoning ordinance and (47) that plan did meet the zoning ordinance's design standards. How could I say it met the entire City Code of Ordinances? That's something for the administration to determine.

* * *

-EXHIBIT HH-

EXCERPTED DEPOSITION OF JOHN SOULLIER

(June 22, 1993)

* * *

(14) * * * Q. Have you been in favor of the hotel project being built on that piece of property?

(15) A. Yes.

MR. EADS: At what time?

MS. BROWN: Always.

A. If I recall correctly, the planning commission voted, I believe it was unanimous in every instance, for every plan that Mr. Handlos submitted. That's from memory now, you could get a copy of the minutes.

Q. I think you're right.

A. I sometimes can't remember what I had to eat for dinner last night.

Q. You believed the City of Harper Woods could benefit from a hotel being built on that piece of property?

MR. EADS: Object to the form of the question.

A. From memory now, we were told this — this must have been back in 1984, I think, when the first plan was submitted, I remember being informed by somebody, probably Mr. Handlos or his architect or representative, that a study had been made by a hotel chain and the gist of its study, as I recall, was that a hotel was needed in this general area. Not relating to this Woodpointe Inn site necessarily but in the area, and, of course, Woodpointe Inn fitted (16) right into that study.

Q. Okay.

A. So that I looked upon it as a good thing, and I think by our vote the whole planning commission was in favor of it.

Q. What about economically, do you think that — did you think it would economically benefit the City?

A. It would bring more tax revenue.

* * *

(34) * * * Q. What about the ladder trucks, do you recall reviewing whether the ladder trucks — whether there would be a fire hazard because the ladder trucks couldn't get in?

A. Well, as I told you earlier, each department is contacted, police department, fire department, the DPW, on any construction petition, and our consultant, Brandon Rogers, attends a meeting when all the departments, including our city manager, are in attendance. Then Brandon Rogers summarizes what each department has said and if the fire department says, "Hey, we can't get a truck through there", then that's no go.

Q. So when Brandon Rogers approves projects —

(35) A. He does not approve.

Q. When he recommends a project, that's only after, to your knowledge, as much as you're aware, it's your understanding that he's already consulted all these departments?

A. That's a given, yes.

* * *

-EXHIBIT II-

EXCERPTED DEPOSITION OF NEIL PATTERSON

(June 23, 1993)

* * *

(12) * * * Q. Can you explain briefly to me what you can recall in regard to the history of the Woodpointe Inn?

A. Just that it's been before us numerous times, before the Planning Commission. We've approved it every time.

Q. Were you personally in favor of a hotel project on that site?

(13) A. Yes, I approved it every time over the years.

Q. Did you believe that particular site could facilitate a hotel?

A. Well, in my mind I questioned the size, but legally it met all the zoning ordinances and I've always approved it.

* * *

-EXHIBIT JJ-

EXCERPTED DEPOSITION OF ALEXANDER VARCHETTI

(June 23, 1993)

* * *

(16) * * * Q. Were you always in favor of the hotel project?

A. It always met the ordinance criteria, yes.

* * *

(3)

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

No. 94-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS, *Petitioners,*

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. MCNALLY, VICTOR G. MAROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council, for City of Harper Woods, Jointly and Severally, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIE MCCANN-O'CONNOR
(Counsel of Record)

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the "arbitrary and capricious" standard is correctly and consistently applied by the Circuits in local land use disputes alleging violation of substantive due process rights.

II. Whether the Sixth Circuit was correct in affirming the dismissal of a local land use dispute alleging violations of substantive due process where the City listed rational reasons for its denial of the property owners' request for a special land use, and where the City had discretion to grant or deny the request.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners,

Woodpointe Inn Associates Limited Partnership
Thomas Handlos and Lucille Handlos

and Respondents

City of Harper Woods, a Michigan Municipal Corporation
James R. Haley, Mayor
James E. Leidlein, City Manager
Gerard Owczarzak, City Building Inspector

Richard A. Eisengruber
Thomas A. Kasunic
James N. McNally
Victor G. Marocco
Virginia Ann Micheletti
David Pochmara
Oresto J. Velardo
Members of City Council, for City of Harper Woods, Jointly and Severally.

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No. 94-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS, *Petitioners,*

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. MCNALLY, VICTOR G. MAROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council, for City of Harper Woods, Jointly and Severally, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, City of Harper Woods, et al. ("City" or "Defendant") respectfully request that this Court deny Woodpointe Inn Associates Limited Partnership, Thomas and Lucille Handlos' ("Petitioners") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeals for the Sixth Circuit's ("Sixth Circuit") opinion in this case.

OPINION BELOW

The opinion of the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan, Southern Division, is reported at 48 F.3d. 1220, 1995 W.L. 94760 (6th Cir. 1995).

JURISDICTION

The Sixth Circuit decision was entered on March 7, 1995. The Petition for Certiorari was docketed with the United States Supreme Court on June 5, 1995. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Sec. I, provides:

"Section I . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Title 42, U.S.C. Section 1983, provides that:

"Every person who under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Introduction

Petitioners, Woodpointe Inn Associates Limited Partnership, Thomas A. Handlos and Lucille Handlos, purchased a vacant piece of property ("Property") in Respondent, City of Harper Woods ("Defendant" or "City") in 1981. Over the next decade, Thomas A. Handlos ("Mr. Handlos") proposed various development schemes, none of which came to fruition. Finally, in 1991, the City granted his request for a special use permit to construct a hotel on the Property. Among the conditions attached to the

permit was that the project be commenced within one (1) year and that a bond equivalent to five (5%) percent of the improvement costs be posted prior to the time work on the project commenced. Although the City granted the special use, no work on the project had begun by November 1991, six (6) months after the permit was granted. Mr. Handlos requested an extension in January 1992, and again in May 1992, days before the one (1) year period was to expire. The City denied both requests and the permit expired.

Mr. Handlos re-applied for a special use permit in October 1992. The City denied it, citing his inability to complete the project over the past eight (8) years and his delinquent record in paying property taxes. Even before the City's denial, Mr. Handlos had filed suit in United States District Court for the Eastern District of Michigan, alleging that the denial of the special use permit was a violation of his right to substantive due process, as well as alleging other constitutional violations. Ultimately, the United States District Court granted the City's motion for summary judgment and the Sixth Circuit affirmed this decision.

B. Factual History

Petitioners' Property is zoned for commercial development. Under the City of Harper Woods Zoning Ordinance, Section 10-164, hotels are permitted in a general business district only after special approval.

Section 10-187 (B), *Procedures For Granting Special Approval Of Designated Land Uses,* specifies that "[t]he City Council as herein created, shall have the following specific powers and duties concerning special approvals. Section 2, *Authorization,* specifies:

> The special approval of specific land uses and activities, as required under section 10-164, may be authorized by the City Council provided that no application for special approval shall be acted upon by the City Council until after (1) a written recommendation is prepared and filed with the City Council by the City Planning Commission, which report

shall become part of the record, and (2) a public hearing is held by the Council.

Section 6, *Standards,* specifies that no special approval shall be granted by Council unless the special use meets certain standards. The Council is to consider whether the special use:

(a) Will promote the use of land in a socially and economically desirable manner for those persons who will use the proposed land use or activity; for those landowners and residents who are adjacent; and for the City as a whole.

(b) Is necessary for the public convenience at the location.

(c) Is compatible with adjacent uses of land.

(d) Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

(e) Can be adequately served by public services and facilities to existing land uses in the area.

(f) Will not cause injury to the value of other property in the neighborhood in which it is to be located.

(g) Will protect the natural environment and help conserve natural resources and energy.

(h) Is within the provisions of uses requiring special approval as set forth in the various zoning districts herein, is in harmony with the purposes and conforms to the applicable regulations of the zoning district in which it is to be located, and meets applicable site design standards for each use specified in Section 10-164.

(i) Is related to the valid exercise of the City's police power and purposes which are affected by the proposed use or activity.

Section 7, *Approval,* notes that:

City Council may deny, approve, or approve with conditions, requests for special approval of a land use. The decision on a special approval shall be incorporated in a statement of

> conclusions relative to the specified land use under consideration. The decision shall specify the basis for the decision, and any conditions imposed. Any approval given by the City Council under which premises are not used or work is not started within six months or when such use or work has been abandoned for a period of six months shall lapse and cease to be in affect [sic].

Between 1981 when Mr. Handlos purchased the Property, and 1991 when the City granted the request for special use, Mr. Handlos approached the City on numerous occasions with proposals for various developments for the Property. A chronological review of these proposals illustrates that the difficulty encountered by Mr. Handlos in developing the Property stemmed not from delays due to obstructions imposed by the City, but rather through self-inflicted delays. Mr. Handlos proposed various development projects for the Property from 1981 through 1991:

1981

In 1981, Petitioners submitted plans for a one hundred and twenty (120) room, four (4) story Sheraton Hotel *(Sixth Circuit Joint Appendix, p 367; hereafter "JA")*. The City initially welcomed the development, anticipating that the hotel project would bring new jobs to the City and provide needed tax revenue. As time passed, however, problems with the design of the hotel and its impact on City services became more apparent. Although Woodpointe Inn Associates Limited Partnership was formed for the purpose of developing the hotel project, it appeared that neither Woodpointe nor Mr. Handlos had the financial capability or experience to see the project through to completion.

1985

Even though Petitioners first submitted plans for the hotel in 1981, Petitioners' request for a special land use permit to develop the hotel was first presented to the City Council on January 16, 1985. The site plan did not comply with the requirements of the City Zoning Ordinance, and the permit was denied. (JA 369). Council considered a second request for a special use permit on

December 16, 1985, and again voted to deny the request, since the site plan was still not in compliance with the requirements of the Zoning Ordinance.

1986

In 1986, the City Planning Commission approved plans for a two (2) story Woodpointe Office Building. Even though both the City Planner and the Planning Commission approved the development of the office building, Petitioners failed to pursue the project and it was never built.

1988

In 1988, Mr. Handlos submitted a plan for a thirty eight (38) unit senior citizen housing development. As with the office building proposed in 1986, the proposal for senior housing was never pursued by Petitioners beyond the submission of the initial plan.

1989

No further effort was made by Mr. Handlos to construct a hotel or any other project on the Property until November 1989, when Petitioners filed a lawsuit against the City in the state court alleging violation of constitutional rights in connection with the City's refusal to grant a special use permit. The lawsuit sought declaratory relief, mandamus and damages. It was dismissed by the Wayne County Circuit Court in April 1990. (JA 344).

1990-1991

In July 1990, Mr. Handlos again sought a special land use permit to construct a hotel on the Property. The City Council voted to approve the special land use permit on May 6, 1991, subject to the following conditions:

1. All those conditions as specified by the Planning Commission in their October 24, 1990 approval, with the exception that the developer has one (1) year from this date to commence construction of this project;

2. The developer shall obtain and meet the requirements for all building, electrical, plumbing, mechanical and other such permits as may be necessary;

3. The developer shall submit a plan for the discharge for sanitary sewer that meets with the approval of the City engineer and does not diminish or adversely affect the sanitary sewer system service, and said plan shall call for the developer to incur any related costs;

4. The developer shall be required in accordance with Ordinance, Section 187 (A), to furnish the city with a cash deposit, certified check, irrevocable bank letter of credit or a surety bond from a surety company that is listed on the federal register, which is issued by the Department of Treasury, in an amount equivalent to five (5%) percent of the improvement costs to assure compliance with all ordinance and permit requirements; and

5. The developer shall be required to relocate, at his expense, any existing public utilities located on the property to the road right-of-way. (JA 371).

Although Petitioners' Brief implies that Mr. Handlos pursued a hotel development project over the course of approximately ten (10) years, the facts show otherwise.

In 1985, when Mr. Handlos requested a special use permit for the hotel project, there was public opposition to the development of the Property as a hotel. James McNally, a defendant in the District Court suit, voiced strong opposition to the hotel project. As noted by Petitioners (Petition at p. 3), Mr. McNally, a citizen whose home was located in close proximity to the proposed project, was present at public meetings and circulated information relating to the proposed development. Throughout this period, however, Mr. McNally was a private citizen, and had no connection to the municipal government.[1] The objections voiced by Mr. McNally and by other citizens of the City included

[1] Mr. McNally was elected to the City Council in May 1991, after Plaintiff's special use permit was issued.

concerns regarding traffic congestion, the size of the project, increased noise and activity due to its location in close proximity to a residential neighborhood, concerns over parking and the necessity for increased city services provided to the hotel. (Petitioner's Appendix at A-15 – A-20).

Although Petitioners assert that the sudden deafness and vertigo suffered by Mr. Handlos following the City's approval of the special use permit in May 1991 was responsible for the fact that the project was not commenced, a review of the facts shows otherwise. On August 7, 1991, Mr. Handlos sent a letter to the City indicating that the size of the project would be cut in half. (JA 28). Although the City Ordinance allowed six (6) months for construction to commence after approval by City Council, and Mr. Handlos was granted twice that amount of time, construction still did not begin. On January 10, 1992, he requested a one (1) year extension to begin construction. The request was denied by City Council on January 20, 1992. (JA 373). Among the reasons noted for the denial of his request for additional time was that Mr. Handlos had been given a reasonable amount of time to substantially commence the project.[2] Furthermore, he had informed the City Council on May 6, 1991, that financing for the project was in line, and when questioned regarding who the financial backers of the project were, he declined the opportunity to answer that question. Moreover, Mr. Handlos had represented to the City Manager that the project was at a stage where the architect and construction manager could take over the project, without the need for his involvement.

Second Request For Extension

On May 4, 1992, shortly before Petitioners' special use permit was due to expire, another request for extension of time was made to the City Council. City Manager, James Leidlein,

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[2] Brandon Rogers, the City Planning Consultant, stated that the one (1) year period allowed by the City for Plaintiff to commence construction was very reasonable. Mr. Rogers also noted that most bona fide projects should be able to be started within a year or that it would be otherwise premature to file them. (JA 479-480).

addressed the City Council and detailed the numerous problems which the City had encountered since the hotel project was first proposed. Mr. Leidlein noted that Mr. Handlos had cited sewer problems as one of the major reasons that he was unable to begin construction of the hotel within a one (1) year period. Mr. Handlos had been advised by the City of sewer capacity problems in the area more than a year before, however, when the City indicated to him that sewer problems might affect the feasibility of his project. (In 1985, when the project was first proposed, the City had a potential solution to sewer capacity problems, but because of changes in the sewer system and in environmental laws, the former solution was no longer viable.) As a condition to the special use approval, the City required Mr. Handlos to submit a plan for the discharge of sanitary sewer meeting the approval of the City Engineer, which did not diminish or adversely affect the sanitary sewer system. Mr. Leidlein indicated further that other than a few phone calls, Mr. Handlos had not submitted any plans to the City or the building department showing how he was going to address the sewer question. He noted that Mr. Handlos had "continually assured the City that once he received City approval, he was ready to go." Although the project was approved almost a year before, ". . . to this date the project essentially has gone nowhere." Mr. Leidlein noted that property taxes on the Property were still in arrears, with the last payment made in March of 1991, for the 1988 and 1989 taxes. The 1990-1991 taxes had yet to be paid, and the delinquency was in excess of $8,500.00. Based on Petitioners' failure to comply with the reasonable conditions of the special use approval, Mr. Leidlein recommended that the second request for an extension of time in which to commence the project be denied. (JA 375).

City Council voted to deny the request for an extension of time to commence construction, citing many of the same reasons noted in the January 1992 denial. Furthermore, the Council noted that Mr. Handlos had failed to submit the bond which was a specific requirement of the City's approval of the construction project.

In an apparent effort to commence construction by the May 6, 1992 deadline, Mr. Handlos began doing ground work on the Property himself. City employees observed Mr. Handlos, the general partner and sole known financier of the multi-million dollar project, taking a sledge hammer to the curb in order to construct a curb cut. The May 4, 1992 City Council Minutes noted, "... Mr. Handlos has been seen personally wielding a sledge hammer to do the curb cuts without using proper signage or proper safety precautions taken to protect the citizens, which shows that the proper backing is not there for such a large construction project when the general partner of the partnership is out there doing the 'grunt work'." (JA 375).

Re-Application For Special Use

Following expiration of the special use permit, Mr. Leidlein informed Mr. Handlos that it would be necessary for him to reapply before construction could begin. (JA 381). Petitioners reapplied in June 1992 and City Council scheduled a hearing to consider the request in October 1992. Prior to the time the City Council met to consider the request, a lawsuit was filed by Petitioners in the United States District Court for the Eastern District of Michigan, Southern Division. Although the City Planning Commission and the City Manager approved the site plan, ultimately the City Council voted to deny the special use permit, expressing doubts regarding the ability of Mr. Handlos to complete the project. Pursuant to City of Harper Woods Zoning Ordinance, Section 10-187 (B) (6) and (7), the City Council was required to consider whether the special use complied with the standards set forth in the Ordinance, and following such consideration was vested with the authority to deny, approve, or approve with conditions, any request for special approval of a land use. *(City of Harper Woods Zoning Ordinance No. 265, § 10-187 B (6) and (7))*. Only after the City Council had complied with the requirements of Section 10-187 B and granted special approval, was the Council required to permit the special use pursuant to Section 10-164 of the Zoning Ordinance.

Numerous citizens spoke in opposition to the project at the public meeting held on October 5, 1992, expressing concern regarding traffic and lack of parking, as well as the fact that the developer had never started work on the project, in spite of previous approvals. City Council voted to deny the special use, noting that the project had been before the City for in excess of eight (8) years, and had consumed a considerable amount of time and effort on the part of the City administration. Moreover, City Council noted that the developer had failed to pay property taxes in a timely fashion, and was currently delinquent on the 1991 and 1992 taxes. Finally, the fact that Mr. Handlos had made representations assuring the City of his ability to find a solution to the sanitary sewer issue, and the fact that he had, in an attempt to commence construction prior to the expiration of the special use permit issued May 1991, begun breaking out the concrete curbs with a sledge hammer and issued a press release stating that he would complete only the first two floors of the project due to an "uncertain economy" all led the Council to express doubts regarding Petitioners' ability to complete the project. (JA 182). Petitioners' suit, filed prior to the time the City Council voted to deny the re-application for a special use claimed that the City and various employees and members of the City Council violated Petitioners' rights to substantive due process.

Although Petitioners complained that the City "maliciously" and "drastically" increased the property assessment on the Property from $33,210.00 to $157,500.00 in order to "harass" Mr. Handlos, the increase in assessment took place in March 1987, four (4) years before Petitioners' special use permit was issued.[3] Mr. Handlos' statement that the City enacted a fast food restaurant restriction ordinance for the sole purpose of "blocking" his ability to construct a fast food restaurant on the proposed hotel site is equally without merit. In his deposition testimony, Mr. Handlos stated that he had never attempted to construct a fast food restaurant on the Property and had never applied for

[3] The City assessor, Gerald Owczarzak, noted that there have been dramatic increases on numerous parcels of commercial property since he was assessor. (JA 485).

approval to construct a fast food restaurant on the Property. (JA 389).

On February 24, 1993, the United States District Court, Eastern District of Michigan, dismissed all counts of Petitioners' Complaint upon Defendant's motion to dismiss, other than Count II (Equal Protection) and Count III (Substantive Due Process).

On August 25, 1993, the District Court granted summary judgment on the remaining counts, granting Defendant's motion and dismissing the claims in their entirety.

Petitioners next appealed the Court's order to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's order in an opinion dated March 7, 1995.

WHY THIS WRIT SHOULD BE DENIED

Petitioners apparently base their argument for granting a Writ of Certiorari on Supreme Court Rule 10.1(a) and (c) contending that the Sixth Circuit decision conflicts with other circuit court rulings. In fact, the Sixth Circuit decision is consistent with this Court's prior rulings and the other circuit rulings are either in accord, or are clearly, factually distinguishable.

I.

THE "ARBITRARY AND CAPRICIOUS" STANDARD IS CORRECTLY AND CONSISTENTLY APPLIED BY THE CIRCUITS IN LOCAL LAND USE DISPUTES ALLEGING VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS.

A. *The Circuit Courts Have Consistently Recognized That The Denial Of A Land Use Permit May, Under Appropriate Circumstances, Constitute A Substantive Due Process Violation*

The general principles underpinning federal substantive due process in the context of land use related civil rights litigation are well-settled. The United States Supreme Court has explicitly

recognized that citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions, *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 263, 97 S. Ct. 555, 562 50 L. Ed. 2d. 450 (1977), and all of the various circuits recognize that, under appropriate circumstances, the denial or withholding of a building permit or site plan approval may constitute a substantive due process violation. *Pearson v. City of Grand Blanc,* 961 F. 2d. 1211, 1217 (6th Cir. 1992); see also *Littlefield v. City of Afton,* 785 F. 2d. 596, 605-607 (8th Cir. 1986).

As more fully set forth below, the standard applied by all of the circuit courts in reviewing substantive due process claims in the land use/zoning context is whether the governmental action was arbitrary and capricious and/or rationally related to a legitimate governmental interest. However, uniformity among the circuits in the application of the arbitrary and capricious standard does not and cannot, as Petitioners suggest, guarantee uniformity of results. Zoning and land use disputes are peculiarly fact dependent. The various circuits have been asked to apply the arbitrary and capricious standard in many contexts involving land use cases. It is therefore incongruous to suggest, as Petitioners do, that differing results necessarily mean that the circuits disagree as to the appropriate principles to be applied.

As stated in *Scott v. Greenville County*, 716 F. 2d. 1409, 1420 (4th Cir. 1983):

> While defendants are undoubtedly correct in asserting that challenges to local zoning decisions are rarely successful outside the context of racial discrimination . . . the primary distinction between winning and losing the case is the sufficiency of evidence and not that the claim is not facially viable . . . regardless of the deference normally afforded zoning practices by the courts, the constitution does not tolerate arbitrary and unreasonable action. Citing *Altair Builders Inc. v. Village of Horseheads,* 551 F. Supp. 1066, 1069 (W.D. N.Y. 1982)

While factual differences affect the disposition of each case, the essential guiding principles employed by the circuits are consistent. All circuits recognize that land use plaintiffs who bring substantive due process claims face difficult evidentiary hurdles. Moreover, all circuits recognize the prudential concern that federal courts should not sit as a super-legislature in land use cases involving peculiarly local interests. A thorough review of the case law illustrates that the circuits have noted discrete subcategories of governmental activities which typically evidence arbitrary and capricious action - for instance, decisions based on personal animus, discrimination or improper political objectives, and denial of a permit or an application when it is otherwise ordinarily granted as of right. These factual subcategories do not create separate standards of review for alleged substantive due process violations; the essential test remains whether the underlying action was arbitrary or capricious.

B. *The Circuit Courts Uniformly Apply An Arbitrary Or Capricious Standard In Reviewing Land Use Decisions For Substantive Due Process Violations*

Contrary to Petitioners' contention, there is substantial uniformity among the circuits with respect to the appropriate review of substantive due process claims in the land use context. The following circuit by circuit survey illustrates that an arbitrary or capricious standard of review is consistently applied. A somewhat more detailed analysis of the factual basis underpinning the cited cases is included because, as the *Scott* court emphasized, the decisions are fact-dependent.

Petitioners attempt to cloud the underlying uniformity among the circuits by plucking out of context quotes from cases which differ factually. In cursory fashion, Petitioners catalogue purportedly "analogous" cases where the courts reached dissimilar results and imply a lack of uniformity of the law. Petitioners also argue that, in light of different results obtained in different circuits, the trial and circuit court erred in this case in concluding that no genuine issue of material fact existed. On these bases, Petitioners request the Supreme Court's assistance in reconciling the "disparity" among circuits.

Petitioners' attempt fails on two grounds. First, upon closer examination, it is evident that in each of the cited cases the circuit courts uniformly applied the "arbitrary and capricious" standard of review in analyzing the respective plaintiffs' federal substantive due process claims. Second, as the cases cited by Petitioners make clear, the respective decisions were premised, as all substantive due process claims are, on specific factual findings.

The First Circuit applies the following test in considering substantive due process challenges to a land use ordinance: "a court should not set aside the determination of public officers in [zoning] matter[s] unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense' " *Smithfield Concerned Citizens for Fair Zoning v. The Town of Smithfield,* 907 F. 2d. 239, 243 (1st Cir. 1990). In *Smithfield,* plaintiffs complained that the new zoning ordinance, which increased lot size requirements and rezoned commercial areas to residential, was arbitrary inasmuch as it was "not grounded in the necessary planning and analysis, by and with the participation of experts in the field." The *Smithfield* court declined to micro-analyze the scope and extent of the council's information gathering process and dismissed plaintiff's claims. *Id.* at 245. In *Licari v. Ferruzzi,* 22 F. 3d. 344 (1st Cir. 1994), the First Circuit, while admitting that the refusal to issue building permits generally does not implicate substantive due process, nonetheless emphasized that such claims were not foreclosed and stated that "[w]e have never announced a rule . . . [precluding] . . . substantive due process violations by land use planning officials." *Id.* at 349.

In *Walz v. Town of Smithtown,* 46 F. 3d. 162 (2nd Cir. 1995), the Second Circuit also applied an arbitrary and capricious standard to a claim for violation of substantive due process under the following distinguishing facts. In *Walz,* plaintiff's water well failed, which forced him to apply for emergency connection to public water service. The emergency application was approved by appropriate authorities, but the highway department refused to

grant plaintiff an excavation permit unless the plaintiff granted the highway department a fifteen (15) foot easement. Typically, such permits were granted as of right. The *Walz* Court found that, denial of the permit was not only arbitrary and capricious but, the court implied, extortionary.

The Third Circuit also applies the arbitrary and capricious standard. *Bello v. Walker,* 840 F. 2d. 1124 (3rd Cir. 1988), *cert denied,* 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d. 107 (1988). See also, *DeBlasio v. The Zoning Board of Adjustment for the Township of West Amwell,* 53 F. 3d. 592 (3rd Cir. 1995) The Third Circuit, when faced with claims that a municipality's zoning regulation violated plaintiff's right to substantive due process, requires plaintiff to prove that the regulation was arbitrary or irrational. *Bello* at 1129 citing *Pace Resources, Inc. v. Shrewsberry Township,* 808 F. 2d. 1023 (3rd Cir. 1987) *cert denied* 482 U.S. 906, 107 S. Ct. 2482, 96 L. Ed. 2d. 375 (1987). In *Bello,* plaintiff sought to develop, in five phases, multiple family housing in conformity with applicable zoning restrictions. Plaintiff built phase I then applied for a building permit for phase V. Defendants denied the permit ostensibly because phase II through IV were not completed. Significantly, the *Bello* Court could find no legitimate reason why the permit was not issued. In short, the actions of the municipality had no rational relationship to any legitimate governmental interest. *Id.* at 1130.

Petitioners alleged that Mr. McNally, while not a member of the City Council and while acting solely as a private citizen, organized public opposition to Petitioners' proposed project. Moreover, Mr. McNally's opposition to the project was not "illegal" or "improper" as was the conduct contemplated in *DeBlasio.* The official's conduct in *DeBlasio* was improper because, despite his financial interest in the outcome, he did not excuse himself from participating in the proceedings. Here, Mr. McNally was not a member of the City Council when Petitioner's building permit was approved and has never had any financial interest in the success or failure of Petitioners' project.

In *Scott v. Greenville County, supra,* the Fourth Circuit held the applicable standard in such land use cases to be "whether

there is a basis for concluding an abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue a building permit." In *Scott,* plaintiff presented evidence suggesting that the city council acted completely outside its authority, and for racially discriminatory reasons, in issuing a moratorium on building permits, of which plaintiff's was the only application pending. Public opposition to the project arose in part because of fears that low income housing would bring minorities and crime. The council delayed approval of the permit in order to attempt to rezone the property and thus create a basis for denying the permit where none previously existed.

The *Scott* court noted that the federal courts are generally "reluctant to sit as a zoning board of appeals" when presented with claims which, though couched in constitutional language, in reality amount only to a run of the mill dispute between a developer and a town planning agency. The court stated that when a zoning action is "tainted with fundamental procedural irregularity, racial animus or the like, such action can amount to an actionable denial of due process." *Id.* at 1419.

The Fifth Circuit likewise recognizes that the denial of a variance may constitute a property right, the arbitrary deprivation of which implicates substantive due process rights. *Shelton v. City of College Station,* 754 F. 2d. 1251 (5th Cir. 1985), *cert denied,* 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d. 566 (1986). In *Shelton,* the Fifth Circuit reversed the district court's entry of summary judgment against plaintiff, questioning whether the denial of a routine variance was arbitrary and capricious, with no substantial relation to the general welfare. *Id.* at 1255. A question of fact existed based on defendants' admission that almost every business in the area, including the subsequent occupier of plaintiff's premises (and three adjacent businesses), had been granted the same routine parking variance sought by plaintiff.

Contrary to Petitioners' assertions, the Sixth Circuit has not merely borrowed the "shock the conscience" standard applicable to criminal cases in determining whether a substantive due process violation has occurred in land use disputes. Rather, as a full reading of the *Pearson* decision makes clear, the Sixth

Circuit, like every other circuit, reviews zoning decisions for violations of substantive due process under an "arbitrary and capricious" standard.

In order to avoid confusion over the applicable standard of review, however, the *Pearson* court attempted to define the degree of "arbitrariness" and/or "capriciousness" necessary under federal law to sustain a claim for violation of substantive due process. The *Pearson* court emphasized that the "shock the conscience" reference used in other substantive due process contexts was useful to emphasize the degree of arbitrariness required to set aside a zoning decision by a local zoning authority — and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law. *Id.* at 1222. The *Pearson* court further noted that "shocks the conscience" refers to extreme irrationality.

Far from creating a separate and distinct substantive due process standard for land use cases, the *Pearson* Court merely applied the prevailing arbitrary and capricious standard. As in most federal land use cases, the *Pearson* Court concluded that based on the record, plaintiff failed to establish a substantive due process violation.

The Seventh Circuit also recognized that the enforcement of a zoning decision will only be overturned if it is arbitrary or applied with discriminatory intent. *Scudder v. Town of Greendale, Indiana,* 704 F. 2d. 999 (7th Cir. 1983). The Seventh Circuit defines arbitrary as being reached "without adequate determining principle" or "unreasonable". *Id.* at 1002. In *Scudder,* the Seventh Circuit affirmed the district court's dismissal under the following facts. Plaintiff applied for permits to build two residences on appropriately zoned property. While applications were pending, a neighbor (a private citizen who held no position in the Greendale Town Government) wrote a letter to the Board of Trustees urging denial of the permit. The Board eventually denied the permit on the basis that the property did not abut a dedicated street as required by the ordinance. Plaintiff sued for due process

violations alleging a "conspiracy" to deny plaintiff the use of his land.

The *Scudder* court dismissed the action because plaintiff proffered no evidence to support his claim that the ordinance was applied discriminatorily. *Id.* at 1003. The *Scudder* court also discounted plaintiff's heavy reliance on the neighbor's opposition. "Certainly the federal constitution does not prohibit a citizen in a democratic society from voicing an opinion to a duly elected official regarding the denial or issuance of a permit." *Id.*

The Eighth Circuit similarly recognizes that an arbitrary denial of a building permit may state a claim for a substantive due process violation. *Littlefield v. City of Afton,* 785 F. 2d. 596 (8th Cir. 1986). In *Littlefield,* plaintiff alleged that the defendants violated its substantive due process rights by conditioning the issuance of a building permit on plaintiff's agreement to convey land to a private individual for non-public use. *Id.* at 603-4. The Eighth Circuit, applying the arbitrary and capricious standard, held that plaintiff presented sufficient evidence to submit the claim to the jury.

The Ninth Circuit is consistent with *Pearson.* In *Bateson v. Geisse,* 857 F. 2d. 1300 (9th Cir. 1988), plaintiff intended to develop a condominium project on property within an appropriately zoned area. Bateson satisfied the final requirements imposed on the building permit, and requested issuance of the permit. The request was denied after the City imposed additional requirements on the permit and initiated a zoning change on plaintiff's property which would have prevented him from building the proposed project. The *Bateson* court noted that plaintiff was required to prove that the interference with his property rights was "irrational or arbitrary", *Id.* at 1303 citing *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S. Ct. 2882, 2892, 49 L. Ed. 2d. 752 (1976), and concluded that defendants acted arbitrarily. The city's regulations provided that once an applicant's building plans complied with the code and other applicable laws and the fees were paid, the building official "must" issue a building permit to the applicant. The regulations did not provide for review by the city council before a permit could issue.

Nonetheless, the city council voted to withhold issuance of the permit without any process whatsoever.

The circuits are in substantial agreement regarding application of the arbitrary and capricious standard of review in substantive due process land use claims, and have not "made inconsistent interpretations" of what constitutes due process violations in land use litigation.

There is uniform acknowledgement that succeeding on such grounds is difficult however, and that run of the mill zoning or building disputes, like this case, do not rise to the level of a constitutional violation.

II

THE SIXTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED IN THIS CASE TO SUPPORT ANY VIOLATION OF SUBSTANTIVE DUE PROCESS.

A. *In Land Use Litigation, Reference To Government Action Which "Shocks The Conscience" Is Useful To Indicate The Degree Of Irrationality Necessary To State A Substantive Due Process Claim.*

In land use litigation alleging substantive due process violations, reference to government action which would "shock the conscience" is useful and illustrative of the degree of irrationality and arbitrariness necessary to state a substantive due process claim. Expressed another way, the state action must show "outrageous government conduct." These references to the degree of "arbitrary and capricious" behavior necessary to state a claim are an acknowledgement that the court must exercise care not to expand the concept of substantive due process "because guideposts for responsible decisions in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d. 261, 273 (1992) quoting

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225-26, 106 S. Ct. 507, 88 L. Ed. 2d. 523 (1985).

This admonition is particularly appropriate in land use litigation matters, an area of historically local control, and may reflect fear of uncontrolled judicial intervention in such zoning matters. Roberts and Shearer, *Land Use Litigation: Takings and Due Process Claims*, the Urban Lawyer, Volume 24, No. 4 (Fall 1992) at 839. (Indeed, Professors Roberts and Shearer refer to *Elsmere Park Club Ltd. Partnership v. Town of Elsmere*, 771 F. Supp. 646 (D. Del. 1991), a case cited by Petitioners in support of their claims, as an example of unwarranted judicial intervention in zoning matters). The requirement that government not be "arbitrary or capricious" in its actions is a constitutionally imposed limit to prevent government from abusing its power. *Collins*, 112 S. Ct. at 1069, 117 L. Ed. 2d. at 274.

In *Pearson v. City of Grand Blanc, supra* the Sixth Circuit discussed the usefulness of measuring the arbitrariness of state action with reference to "shocks the conscience" terminology.[4] The *Pearson* court stated that the state action must be "arbitrary and capricious action in the strict sense", with no rational basis for the decision. *Pearson* at 1221. *Pearson* went on to state that the "shocks the conscience" terminology was useful in the zoning context to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law, where state administrative action may be set aside as "arbitrary and capricious" on the grounds that it is not supported by substantial evidence. *Pearson* at 1222. "Shocks the Conscience" terminology refers to extreme irrationality, which is consistent with the standard applied by other circuits.

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[4] Donald A. Dripps, *At the Borders of the Fourth Amendment: Why A Real Due Process Test Should Replace the Outrageous Government Conduct Test*, University of Illinois Law Review Vol. 1993, No. 2, cited by Petitioners is inapposite to the facts of this case, since it deals exclusively with the constitutional law of search and seizure under the Fourth Amendment.

The continuing relevance of this terminology was recently noted. Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, Columbia Law Review, Volume 93, II (March 1992). [hereafter, Fallon, *Due Process*]. Professor Fallon, in analyzing this Court's recent decision in *Collins v. City of Harker Heights*, *supra* noted that the decision could be interpreted to suggest that conduct could be arbitrary in a constitutional sense only if it shocked the conscience. *Id.*, at 325.

The underlying principle by which all of the circuits determine whether a substantive due process violation has been stated is whether the government's action has been shown to be "arbitrary and capricious". (See Argument I, supra). As Professor Fallon notes, the underlying idea is that government officials must act on "public spirited" rather than "self-interested or invidious motivations", and that there must be a rational or reasonable relationship between government's ends and its means. *Fallon, Due Process, supra* at 310.

Accepting that the substantive rights protected by the Due Process clause of the Constitution are not susceptible to a simple and easily stated formula, the generally accepted view that government action must not be arbitrary and capricious, that it must be based on the public interest rather than personal motivation, and that it should accord with widely shared moral intuitions or principles, makes the terminology employed by the *Pearson* court appropriate to a consideration of whether a substantive due process claim has been stated.

Considered in this context, Professor Fallon's article supports the approach taken by the Sixth Circuit in analyzing substantive due process claims. He states that in cases of this kind, the courts generally will render a judgment of unconstitutionality only when government, in its view, has behaved in a way that can be shown to be wrongful by relatively direct argumentative appeal to some moral intuition or relatively determinate principle that it believes to be widely shared and, preferably, rooted in history. *Fallon, Due Process, supra* at 321.

Testing this formulation against the *Pearson* "shocks the conscience" approach provides appellate courts with a rough yard stick of what society would judge to be a grievous breach of the government's duty to pursue legitimate ends in reasonable ways.

There is general agreement among the circuits that "arbitrary and capricious" conduct by the government is the standard by which substantive due process claims should be assessed. It is in determining what actions constitute "arbitrary and capricious" conduct that difficulties arise. Given the complexity and the reach of the Due Process clause it is unlikely that this question can be easily resolved. Weighing against the expansion of this area of the law, however, are concerns regarding the increasing volume of federal litigation, the necessity of developing constitutional standards defining the scope of duties and liabilities of state officials and, finally, a reluctance to displace traditional state authority and alter "longstanding balances of power in the federal system." *Id.*, at 350.

Given the need to strike a proper balance between the traditionally local nature of land use regulation and the constitutionally mandated protection from arbitrary government behavior, the courts have wisely concluded that government action is implicated under the Due Process clause only when it engages in "arbitrary" conduct which is repugnant to widely held beliefs, but which is not, in any sense, the equivalent of the state law standard prohibiting land use regulation without substantial evidence regarding its necessity. The *Pearson* approach is an appropriate expression of this balancing of interests.

B. *Standard Of Review*

The Sixth Circuit reviewed the District Court's grant of summary judgment de novo. *Hanover Ins. Co. v. American Engineering Co.*, 33 F. 3d. 727, 730 (6th Cir. 1994). Once a defendant makes a properly supported motion for summary judgment, the burden shifts to the plaintiff to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d. 202 (1986). Summary judgement is justified if, based on all of the

evidence presented, including pleadings, depositions and answers to interrogatories, the court is satisfied there is no genuine factual issue for trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Although the court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, only reasonable inferences from the evidence need be considered by the court. Whether an inference is reasonable must be considered "in light of the competing inferences" to the contrary. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d. 538 (1986). A court is not bound to accept as true a legal conclusion couched as a factual allegation. Furthermore, the court is not bound to credit, and indeed may disregard assertions where no actual facts in support of the assertions were alleged. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 92 L. Ed.2d. 209, (1986).

In the end, the non-moving party must do more than present a "scintilla" of evidence in its favor. *Anderson*, 477 U.S. at 252. If the evidence is merely "colorable" or "not significantly probative" a motion for summary judgment may be granted. *Anderson*, 477 U.S. at 249-250.

C. *Summary Judgment Is Appropriate Where There Are No Genuine Issues Of Material Fact Regarding A Substantive Due Process Violation*

To state a claim that the City's action violated substantive due process, Petitioners must demonstrate that they had a property interest which could support the substantive due process claim for a special use permit, that they possessed a legitimate claim of entitlement, and that the government action in denying the permit was arbitrary and irrational, with no reasonable basis. *Triomphe Investors v. City of Northwood*, 49 F. 3d. 198, (6th Cir. 1995). The claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning. *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F. 3d.

810, 828, (4th Cir. 1995), quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d. 797 (1974).

The procedures governing the grant or denial of a special use are set forth in the City of Harper Woods' Zoning Ordinance. Although Section 10-164 of the City Ordinance, *Uses Permitted After Special Approval*, states that hotels, among other uses, shall be permitted by the City Council, it continues that such uses shall be permitted only "after it [City Council] has conducted a public hearing and after review of the proposed site plan by the City Planning Commission pursuant to procedures and general standards established in Section 10-187B, subject to the specific standards for each particular land use hereinafter itemized and subject to site plan review required under Sections 10-165 and 10-134." The special use permit is required, therefore, only after the City Council approves the special use request, and furthermore considers it in light of the standards set forth in 10-187B(6). After determining whether the special use complies with these standards, Section 7, *Approval*, states that "the City Council may deny, approve or approve with conditions, requests for special approval of a land use." Contrary to Petitioners' assertions that there is no discretion on the part of the City Council in reviewing and approving a request for a special use, City Council is given broad discretionary authority.

The required focus in assessing a constitutional violation based on denial of substantive due process is not whether the denial of the request for special use was supported by a preponderance of substantial evidence, as might be the case in a state court inquiry, but rather whether City Council acted irrationally in denying the permit. *Triomphe*, 49 F. 3d. at 202. If a reasonable basis exists for denying the special use request, then a substantive due process violation claim is unfounded. *Id.* Moreover, the City Council may properly consider citizen opposition to the proposed property use. Even negative attitudes or unsubstantiated fears "are properly cognizable in a zoning proceeding." *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d. 313 (1985). The City Council based its denial of Plaintiff's 1992 reapplication for a special use on

legitimate doubts regarding the ability of Mr. Handlos to complete the project, given the eight (8) years during which it had been before the City Council. The City Council also considered the tax arrearages, the failure of the plaintiff to propose any solution to the sanitary sewer issue, and the fact that Mr. Handlos was the only construction worker who had ever been seen working on the project during the time the 1991 special use permit was in effect.

Petitioners' assertion that partisan, political reasons unrelated to the merits of the application were responsible for the City's decision, thus establishing a potential substantive due process violation, are completely and utterly unsupported in the record.

The facts show that City Councilman McNally, about whom Petitioners complain, was a vocal opponent of Petitioners' *1985* special use request, which was denied by the City Council. Mr. McNally was, however, a private citizen at this time, unconnected in any way to the City government. As such, he had a right to voice his opposition to the hotel project as he saw fit. *Cleburne*, 473 U.S. 432, 448. Even if such citizen opposition had influenced the City's decision to deny the special use permit in 1985, it would not have given rise to a substantive due process violation. "Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community." *Sylvia Development Corp.*, 48 F. 3d. at 828. Moreover, the events of which Petitioners complain took place in 1985, six (6) years prior to the time City Council *approved* Petitioners' request. Events which took place six (6) years prior to the acts complained of, and are based on the behavior of private citizens simply do not state a claim for substantive due process violations on the part of the City. It was Mr. Handlos who failed to comply with the reasonable conditions imposed by City Council in granting the special use permit in May 1991. During the year in which he was given to commence construction of the hotel project (two times the length specified by the City Ordinance) he took no steps to

comply with the requirement that he submit a plan for the discharge for sanitary sewer that met with the approval of the City Engineer and did not adversely affect the sanitary sewer system. During the course of that year, no plans were submitted to the City Engineer regarding the sewer discharge. Mr. Handlos tendered no bond to the City during the course of the year, as required as a condition to the special use, attempting only to tender a five (5%) percent bond for the estimated cost of the foundation improvements, rather than a five (5%) percent bond for the cost of the project improvements days before the special use permit expired.

Although, as Petitioners assert, the re-application for a special use permit filed by Mr. Handlos in October 1992, was essentially the same proposal which had been presented to the City Council the prior year, the Council's decision to deny the special use permit was clearly rational given the circumstances of the case and the City's prior dealings with Mr. Handlos. In denying the request, City Council noted that taxes on the Property continued to be in arrears, that during the prior year, Mr. Handlos had submitted no plans to the City Engineering Department regarding the sewer discharge problem, that Mr. Handlos had failed to tender the five (5%) percent improvement bond required as a condition, and that Mr. Handlos was the only construction worker to have worked on the project. Taking into consideration these facts, it was a rational decision on the part of the Council to conclude that Mr. Handlos was unable to complete the project and that to allow him to continue could very well result in the City being left with partially completed "improvements" which would have to be finished at taxpayer expense. Although the summary judgment standard requires a court to resolve conflicting inferences from circumstantial evidence in favor of the non-moving party, it does not require the court to "... ignore or distort the plain meaning of words or conveniently to read them out of context." *Sylvia Development Corp.*, 48 F. 3d. at 822 quoting *Ford Motor Co. v. McDavid*, 259 F. 2d. 261, 266 (4th Cir. 1958) *cert denied* 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d. 229 (1958).

Petitioners' attempts to cast the comments made in 1985 by Mr. McNally and other citizens opposing the development of the hotel project on Petitioners' Property as improper, are a gross distortion of the facts, in an attempt to imply that political or racial animus was involved in the City's decision, even though the record is completely devoid of any such inferences.[5]

Petitioners contend that the "only possible legal basis" for denying the request for extension of the special use permit and the re-application was the existence of new ordinances, standards or regulations. (Petition at 23). This is not only factually inaccurate, but also misconstrues the protection afforded by the concept of substantive due process, which requires a showing that the City's action had no rational basis, and was egregious, outrageous, and irrational. *Amsden v. Moran*, 904 F. 2d. 748, 754 (1st Cir. 1990), *cert denied*, 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d. 702 (1991).

Petitioners cite *Walz v. Town of Smithtown, supra*, where evidence showed that the local ordinance allowed officials no discretion regarding whether to grant a permit. The Council had authority to review the request to determine if it met the standards set forth in the Ordinance, and then to approve, deny or approve the request with conditions. Moreover, Petitioners do not allege that the Council's denial of the extension was merely an extortionary attempt to gain concessions from Petitioners.

Petitioners cite *DeBlasio v. Zoning Board of Adjustment for the Twp. of West Amwell, supra* where evidence indicated personal financial gain by a council member motivated denial of the permit. The record in this case shows no evidence whatsoever of personal animosity or partisan political reasons as the basis for the

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[5] Note that allegations raising the issue of racial or political animus were first raised by Petitioners in responding to Defendant's Motion to Dismiss in the District Court. The issue was never mentioned in either the Complaint or First Amended Complaint filed by Petitioners with the U.S. District Court. Moreover, these allegations refer to the 1985 denial of Petitioners' special use request, not the 1991 grant of the request. In light of the substantial problems with the earlier attempt to develop the Property there was a reasonable basis for denying the re-application request in 1992. *Triomphe*, 49 F.3d. at 202.

City's denial of the re-application, in spite of the fact that Petitioners took approximately twenty (20) depositions during discovery.

Petitioners cite *Scott v. Greenville County, supra* where evidence supported plaintiff's contention that denial of the developer's request was based on racial animus. The record in this case is completely devoid of any evidence that the City's action in denying the re-application was motivated by racially discriminatory intent.

Petitioners cite *Bello v. Walker, supra* where evidence indicated defendants denied a permit for personal and political reasons. There is no evidence in the record in this case to show that the 1992 denial of Petitioners' special use was motivated by personal or political reasons.

There is no evidence in the record to support any inference that the City acted in denying Petitioners' re-application for a special use for anything other than the rational reasons set forth in the Council's decision. Petitioners ignore the fact that a special use permit was issued in May 1991, and that Mr. Handlos was unable to commence construction during the one (1) year period prior to the expiration of the permit, and failed to comply with other conditions attached to the permit. Given the development history of this project, and the inability of Mr. Handlos to proceed with development, the City was fully justified in denying the re-application request.

This case provided no "genuine" issues of material fact. Petitioners offered only "legal conclusions" couched as "factual assertions" and unsupported inferences, based on language taken out of context. The evidence offered by the City in support of its actions was persuasive and essentially uncontroverted. Summary judgment was appropriate under the standards set forth by this Court, and Petitioners' have not — and cannot — offer any valid reasons for review of the decision of the Sixth Circuit Court of Appeals.

CONCLUSION

Upon review of the facts and circumstances surrounding this case, this Court should deny the Petition of Woodpointe Inn and Thomas and Lucille Handlos, seeking review of the dismissal of their federal claims because it is clear that the decision was properly made and this case otherwise fails to warrant review by this Court.

Dated: June 26, 1995

Respectfully submitted,

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